NO. 03-16-00068-CV

IN THE COURT OF APPEALS
FOR THE THIRD DISTRICT OF TEXAS
AUSTIN, TEXAS

SWEETEN TRUCK CENTER, L.C.,
Appellant

v.

TEXAS DEPARTMENT OF MOTOR VEHICLES, et al.,
Appellees

BRIEF OF APPELLEE VOLVO TRUCKS NORTH AMERICA, A DIVISION OF VOLVO GROUP NORTH AMERICA, LLC

On Removal from the District Court of
Travis County, Texas

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STATEMENT REGARDING ORAL ARGUMENT

Volvo Trucks North America, a division of Volvo Group North America, LLC ("Volvo Trucks") does not believe that oral argument is necessary to aid the Court in correctly deciding the issues presented in this appeal.

STATEMENT OF FACTS

I. This Case Involves The Modification Of Sweeten's "Area Of Responsibility" Under Its Dealership Agreement With Volvo Trucks.

Volvo Trucks manufactures Class 8 trucks that are distributed through a network of authorized dealers. (4 AR 3108).[1] In 2003, Appellant Sweeten Truck Center, LP ("Sweeten") became the sole Volvo Trucks dealer for the Houston, Texas market area when it entered into a Volvo Trucks Dealer Sales and Service Agreement ("Dealer Agreement"). (4 AR 3099, 3 AR 2423, 744:22-745:4).[2] In the Dealer Agreement, Sweeten agreed to "vigorously and aggressively promote" the sale of Volvo Trucks products throughout its geographic area of responsibility ("AOR") and to "provide courteous, convenient, prompt, efficient, quality service" to Volvo Trucks customers. (4 AR 3113, 3116). Sweeten is currently assigned a 24-county AOR that encompasses the greater Houston metropolitan area and many of the counties surrounding it. (4 AR 3149, 3168).

[1] Citations to the administrative record are as follows: "[Vol. No.] AR [Pg. No.]."

[2] The hearing transcript is contained in Volume 3 of the Administrative Record. Citations to the hearing transcript are as follows: 3 AR [Pg. No.], [Transcript Page:Line].

Under the Dealer Agreement, Volvo Trucks has the sole right and discretion to modify Sweeten's AOR.[3] (4 AR 3110). Volvo Trucks notified Sweeten of its intent to modify Sweeten's AOR by removing eleven of the 24 counties assigned to Sweeten. (4 AR 3156-58). Volvo Trucks later amended its notice to remove ten counties instead of eleven ("Removed Counties"), leaving Sweeten with 14 counties ("Remaining Counties").[4] (4 AR 3159-66). In response, Sweeten filed the underlying protest with the Texas Department of Motor Vehicles, Motor Vehicle Division ("Division"), which led to a hearing on the merits. (1 AR 3-6).

II. Evidence Supporting Good Cause For The Modification.

Sweeten's AOR is one of the top five markets in North America for Class 8 trucks. (3 AR 2276-77, 355:20-356:11; 3 AR 2145, 49:7-18). Volvo Trucks classifies its markets based on size with "A Market" referring to the largest classification and "C Market" referring to the smallest. (3 AR 2145, 49:7-50:5; 3 AR 2285, 388:18-20). Houston is one of the largest A Markets. (3 AR 2145, 49:7-50:5; 3 AR 2387, 599:11-600:12). The Remaining Counties alone account for 27% of all economic activity in Texas and have an economy larger than that of some states. (3 AR 2278, 360:11-361:8; 4 AR 3058-61).

[3] Subject to Tex. Occ. Code §§ 2301.454 and 2301.455 as discussed below.

[4] For maps of the Remaining and Removed Counties, *see* 4 AR 3168-75.

Despite being the only Volvo Trucks dealer in one of the top five markets in North America, Sweeten has consistently underperformed. (3 AR 2153-54, 82:20-83:6, 84:18-85:2, 86:2-12, 87:5-90:3; 4 AR 3191-3209, 3226, 3243-3254). Volvo Trucks decided to modify Sweeten's AOR due to Sweeten's:

(1) poor overall sales performance;

(2) lack of sales activity in the Removed Counties;

(3) poor performance on Volvo Trucks' dealer performance metrics;

(4) excessive number of customer service complaints; and

(5) lack of adequate representation of the Volvo Trucks brand within the Removed Counties.

(3 AR 2792, 1480:23-1481:15; 4 AR 3156-66).

A. Sweeten's poor overall sales performance.

Sweeten's overall sales performance has been consistently low. (3 AR 2153-54, 82:20-83:6, 84:18-85:2, 86:2-12, 87:5-90:3; 4 AR 3191-3209, 3226, 3243-3254). The following chart shows Sweeten's earned market share for 2010-2013 in comparison to Volvo Trucks' national averages:[5]

[5] Earned market share is calculated using truck registration records. (3 AR 2147-48, 59:20-61:16). Registrations are credited in the county where a customer first applies for title and license plates. (*Id.*). Earned market share is calculated by dividing the number of trucks sold by a given dealer (whether or not registered within its AOR) by the total number of industry registrations among all truck brands within the dealer's AOR. (*Id.*).

Year	**Sweeten's Market Share Current AOR**	**Volvo Trucks National Market Share**
2010	3.1%	10.9%
2011	1.2%	14%
2012	5.8%	12.4%
2013	3.5%	13.2%

(4 AR 2900-02, 3002, 3005, 3008, 3011).

B. Sweeten's poor sales performance in the Removed Counties.

Within the Removed Counties, Sweeten's sales accounted for the following earned market shares, which fall far below Volvo Trucks' expectations: 1.5% for 2010; 0.9% for 2011; 0.3% for 2012; and 1.9% for 2013. (4 AR 2902, 3002, 3005, 3008, 3011). Although there were 1,243 industry registrations of Class 8 trucks within the Removed Counties from 2010-2013, Sweeten made only nine of those sales.[6] During the same time period, Sweeten sold no trucks at all in eight of the ten Removed Counties, only one truck in the ninth county, and only eight out of 781 industry sales in the tenth county. (4 AR 3631-64; 3 AR 2159, 106:13-107:7).

Sweeten's own sales manager, Chase Robinson, testified that Volvo Trucks' sales expectations are reasonable and achievable. (3 AR 2359-60, 488:15-491:5). Mr. Robinson also testified that Sweeten did not meet Volvo Trucks' sales expectations because it lacked sufficient sales staff and Sweeten's management did not provide enough guidance to its sales staff. (3 AR 2364, 505:22-506:15).

[6] *See* 4 AR 3631-64; 3 AR 2158-60, 104:15-109:7; 3 AR 2661-63, 1214:16-21; 1216:18-21; 1218:19-22; 1220:15-21; 1221:3-6; 1221:18-20; 1222:22-24).

From 2010-2013, Sweeten's new truck sales within the Removed Counties accounted for only 2.6% of its total new truck sales. (3 AR 2258-59, 283:21-284:16; 4 AR 2895). During the same time period, only 2.2% of Sweeten's service business and 1.5% of its parts business came from the Removed Counties. (4 AR 2914; 3 AR 2259, 285:8-286:24).

C. Sweeten's poor performance on dealer performance metrics.

1. Dealer Operating Standards.

Sweeten consistently performed poorly on the Dealer Operating Standards ("DOS"). (3 AR 2792, 1480:23-1481:6). DOS is set of written criteria that measures best practices across the dealer network in categories such as customer service, parts, staffing, and operation of the dealership. (3 AR 2148, 62:25-63:17; 3 AR 2152, 80:10-23). DOS is scored on a 100-point scale. (3 AR 2148, 63:11-17; 3 AR 2153, 82:20-25). Sweeten's DOS scores have been consistently low: 57 for 2011; 73 for 2012; 58 for 2013; and 69 for 2014. (3 AR 2153-54, 82:20-25, 84:13-22, 86:2-12, 87:5-17, 88:2-89:10; 4 AR 3191-3209, 3226, 3243-3254). In contrast, other A Market dealers generally maintain DOS scores of 90 or higher. (3 AR 2153-54, 84:23-85:2). At the time of the hearing, Sweeten was Volvo Trucks' lowest performing A Market dealer. (3 AR 2154-55, 88:2-90:7; 3 AR 2285, 391:18-22; 4 AR 3254).

2. Customer Service Index.

Sweeten also had substandard performance on the Customer Service Index ("CSI"). (3 AR 2792, 1480:23-1481:6). CSI measures the results of customer service surveys conducted by a third-party who provides the survey results to Volvo Trucks and the dealer. (3 AR 2148, 63:18-64:7; 4 AR 3255-86). Sweeten is among the lowest performing A Market dealers with respect to CSI scores. (3 AR 2155-57, 90:8-98:1; 4 AR 3255).

D. Sweeten's history of excessive service complaints.

Sweeten has a long history of customer complaints related to its service department. (3 AR 2161, 113:8-114:12; 3 AR 2163-64, 124:13-125:20; 5 AR 7973-77; 3 AR 2424, 746:22-747:9; 3 AR 2426-37, 754:8-10, 761:15-764:25, 768:7-797:12, 798:4-800:5; 6 AR 8023-8514). At the hearing, Volvo Trucks introduced service complaints received by 75 different Volvo Trucks' customers involving hundreds of individual complaints. (6 AR 8023-8514). Such complaints continued up to the time of trial. (3 AR 2393-94, 625:24-626:24, 627:10-21; 3 AR 2413, 704:10-705:4; 6 AR 8210-18).

E. There is a strong class 8 truck market in the Removed Counties that Sweeten is not serving.

Sweeten failed to adequately represent the Volvo Trucks brand within the Removed Counties despite the existence of a strong Class 8 truck market as demonstrated by the Vehicles in Operation Reports ("VIO"). (3 AR 2160-61,

109:22-113:7; 5 AR 7069-73). The VIO is a 10-year snapshot of the number of trucks that are in operation within Sweeten's AOR. (3 AR 2160, 109:22-110:17). The VIO confirms there is a substantial amount of trucking business in the Removed Counties. (3 AR 2160-61, 110:18-112:6, 112:11-113:1; 5 AR 7069-73). The VIO shows that, standing alone, the Removed Counties would be the 7th largest Volvo Trucks AOR in Texas. (3 AR 2160, 110:18-111:16; 4 AR 2891; 5 AR 7069-71).

III. Volvo Trucks Proved Good Cause For The Modification.

The Administrative Law Judge ("ALJ") conducted a six-day hearing on the merits which generated a 1,522 page record and 142 admitted exhibits. (2 AR 1896; 2 AR 1941; 32 AR 24320). Each party called seven witnesses in their respective cases in chief. (2 AR 1941). The parties also submitted to the ALJ depositions of additional fact witnesses. (2 AR 1452-69). The ALJ issued the Proposal for Decision ("PFD") containing findings of fact and conclusions of law in support of his decision that Volvo Trucks established good cause to modify Sweeten's AOR. (2 AR 1930-40). In the PFD, the ALJ reviewed the evidence presented at trial, and the parties' post-hearing briefing, on each of the statutory factors under Code § 2301.455. (2 AR 1913-1917, 1923-24, 1927-30).

The ALJ concluded that Volvo Trucks established good cause based on Sweeten's (1) sales in relation to sales in the market, (2) investment and

obligations, and (3) inadequate service facilities, equipment, parts, and personnel. (2 AR 1913-1917, 1923-24; Tex. Occ. Code § 2301.455(a)(1), (2), and (4)).

Sweeten filed exceptions to the PFD and both parties argued their positions before the Board of the Texas Department of Motor Vehicles ("Board"). (2 AR 2018; 29 AR 24191). The Board adopted the PFD in its Final Order, along with certain technical revisions recommended by the Motor Vehicle Division's ("Division") legal counsel that neither party opposed.[7] (30 AR 24193). Sweeten then filed a motion for rehearing which the Board denied. (31 AR 24235).

SUMMARY

The Court should affirm the Final Order because Volvo Trucks established good cause under Code § 2301.455 to modify Sweeten's AOR. The ALJ issued a reasoned PFD, citing to sufficient record evidence on each statutory factor, which clearly shows that Sweeten neglected its contractual duties within its AOR, and even more so within the Removed Counties. Sweeten does not controvert the facts upon which the Board based its good cause determination. Among them, Sweeten sold no trucks at all in eight of the ten Removed Counties from January 1, 2010 to the time of trial, only one in another, and only eight out of 178 industry sales in the last. Sweeten's glaring lack of sales activity in the Removed Counties follows from its complete lack of financial investment and effort to develop business in those

[7] Because the Board adopted the PFD in the Final Order, Volvo Trucks refers herein to "the Board" unless some distinction between the ALJ and the Board is necessary due to the context.

counties. There was no evidence presented of any harm to Sweeten's investment in its dealership as a result of the modification. Moreover, abundant record evidence supports the Board's conclusions that Sweeten's service department and facilities have long been substandard.

Because Sweeten cannot controvert the facts underlying the good cause determination, it focuses instead on a strained interpretation of Code §§ 2301.454 and 2301.455 that would require the Board to give greater weight to what Sweeten calls the "currently existing circumstances" than to the evidence of Sweeten's substandard performance. Sweeten cites no authority in support of its "currently existing circumstances" argument, and nothing in the plain language of the statute supports it. Sweeten cannot demonstrate reversible error in any event because the Board did consider all such evidence and the Court may not reverse based on weight or credibility of the evidence.

Sweeten further argues that the Board failed to adequately consider what Sweeten claims is the "existing circumstance" that Volvo Trucks has a plan to establish a new dealership in the Removed Counties. The Board properly rejected Sweeten's argument based on the Board's prior precedent in *Cardenas*[8] which holds that the alleged harm a dealer may suffer in the future from the establishment

[8] *Cardenas Enters. v. Toyota Motor Sales USA, Inc., Texas Dep't of Transp.*, Motor Vehicle Division, Docket No. 06-0034LIC, p. 3 (Oct. 17, 2008) (Sweeten's Appx, Tab 3).

of a dealership in the area removed from the dealer's AOR is not relevant in an AOR modification case.

Even if such evidence were relevant in an AOR modification case, there is no evidence in the record that Volvo Trucks currently has such a plan, and the Board properly determined that the evidence Sweeten presented of its alleged harm was too speculative to be given weight. Moreover, Sweeten's argument is inherently contradictory. With respect to the statutory good cause factors, Sweeten argues that "existing circumstances" means "the present time" and "something that exists now." With respect to the hypothetical new dealership, however, Sweeten argues that "existing circumstances" means the Board should have given greater weight to the speculative harm that Sweeten might suffer in the future if the new dealership were ultimately established. The Board properly rejected Sweeten's arguments regarding the hypothetical new dealership.

Sweeten's appeal depends upon the Court adopting Sweeten's "currently existing circumstances" theory which goes only to the weight the Board gave to the "current" evidence in comparison to the evidence of Sweeten's long-standing substandard performance. Because the Court cannot reverse on weight of the evidence, Sweeten cannot meet its burden of showing reversible error, and the Court should affirm the Final Order.

STANDARD OF REVIEW

The Court reviews agency decisions under the "substantial evidence rule." (Tex. Occ. Code Ann. § 2301.751(a)). Under the substantial evidence rule "a court may not substitute its judgment for the judgment of the state agency on the weight of the evidence on questions committed to agency discretion." (Tex. Gov't Code Ann. § 2001.174). The Court may reverse only if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

> (A) in violation of a constitutional or statutory provision;
>
> (B) in excess of the agency's statutory authority;
>
> (C) made through unlawful procedure;
>
> (D) affected by other error of law;
>
> (E) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or
>
> (F) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

(Tex. Gov't Code § 2001.174). Thus, reversal requires Sweeten to show both substantial prejudice and error under at least one of the enumerated factors. *Texas Dept. of Public Safety v. Varme*, 262 S.W.3d 34, 38 (Tex. App.—Houston [1st Dist.] 2008, no pet.) ("To warrant either reversal or remand, therefore, the reviewing court must conclude that (1) substantial rights of the appealing party

have been affected because of (2) one or more of the reasons listed in section §§ 2001.174(2)(A)-(F).”). Sweeten, however, does not cite Gov’t Code § 2001.174 and never explains how it satisfies either the substantial prejudice element or any of the enumerated factors. Instead, Sweeten only sprinkles its brief with unsupported references to “substantial rights” and “errors of law.”

The Court presumes that the findings, inferences, conclusions, and decisions of the Board are supported by substantial evidence. *Buddy Gregg Motor Homes, Inc. v. Motor Vehicle Bd. of Texas Dep’t of Transp.*, 156 S.W.3d 91, 99 (Tex. App.—Austin 2004, pet. denied). The Court then determines under a “reasonableness or rational-basis test” whether “the evidence in its entirety is sufficient that reasonable minds could have reached the conclusion the [Board] did.” *Buddy Gregg*, 156 S.W.3d at 99.

The Court must affirm the Final Order even if the record evidence “preponderate[s] against” it as long as the Court finds “more than a mere scintilla” of supporting evidence. *Id.; see also Buddy Gregg Motor Homes, Inc. v. Marathon Coach, Inc.*, 320 S.W.3d 912, 925 (Tex. App.—Austin 2010, no pet.) (“substantial evidence does not mean ‘a large or considerable amount of evidence’” and Courts “may not set aside the ALJ’s decision merely because testimony was conflicting or disputed, or because it did not compel the decision”). In reviewing the evidence,

the Court may not substitute its judgment for the Board's and may not judge the weight or credibility of the evidence. (Tex. Gov't Code § 2001.174).

Sweeten bases its appeal solely on the weight and sufficiency of the evidence and does not raise any questions of law. If Sweeten had raised any questions of law, the Court would review them *de novo*. *Marathon Coach*, 320 S.W.3d at 924; *Texas Health & Human Servs. Comm'n & Office of Inspector Gen. v. Antoine Dental Ctr.*, No. 06-15-00076-CV, 2016 WL 1574634, at *15 (Tex. App.—Texarkana Apr. 7, 2016, no pet. h.). On review of an agency's decision, however, *de novo* does not mean that the Court gives no deference to the agency's statutory interpretation. Instead, the Court must give "serious consideration" to, and uphold, the agency's construction of the statute as long as it is "reasonable and consistent with the statutory language." *Marathon Coach*, 320 S.W.3d at 924-25. Even as to alleged errors of law, the Court presumes that an agency order is valid and the burden of proving otherwise is on the party challenging the order. *Continental Cars, Inc. v. Tex. Motor Vehicle Comm'n*, 697 S.W.2d 438, 441 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).

As shown below, the Court should affirm the Final Order because Sweeten does not carry its burden of proving reversible error.

ARGUMENT & AUTHORITIES

I. Sweeten's "Currently Existing Circumstances" Argument Fails.

For its first two issues, Sweeten asks the Court to adopt a novel and erroneous interpretation of Texas Occupations Code §§ 2301.454 and 2301.455 which provide as follows:[9]

Code § 2301.454:

> (a) Notwithstanding the terms of any franchise, a manufacturer, distributor, or representative may not modify or replace a franchise if the modification or replacement would adversely affect to a substantial degree the dealer's sales, investment, or obligations to provide service to the public, unless:
>
> > (1) the manufacturer, distributor, or representative provides written notice by registered or certified mail to each affected dealer and the department of the modification or replacement; and
> >
> > (2) if a protest is filed under this section, the board approves the modification or replacement.
>
> * * *
>
> (d) After a protest is filed, the board shall determine whether the manufacturer, distributor, or representative has established by a preponderance of the evidence that there is good cause for the proposed modification or replacement. The prior franchise remains in effect until the board resolves the protest.

Code § 2301.455:

> (a) Notwithstanding the terms of any franchise, in determining whether good cause has been established under Section 2301.453 or 2301.454, the board shall consider all existing circumstances, including:
>
> > (1) the dealer's sales in relation to sales in the market;

[9] Texas Occupations Code, Section 2301.001 *et seq.*, is referred to as "Code."

(2) the dealer's investment and obligations;

(3) injury or benefit to the public;

(4) the adequacy of the dealer's service facilities, equipment, parts, and personnel in relation to those of other dealers of new motor vehicles of the same line-make;

(5) whether warranties are being honored by the dealer;

(6) the parties' compliance with the franchise, except to the extent that the franchise conflicts with this chapter; and

(7) the enforceability of the franchise from a public policy standpoint, including issues of the reasonableness of the franchise's terms, oppression, adhesion, and the parties' relative bargaining power.

(b) The desire of a manufacturer, distributor, or representative for market penetration does not by itself constitute good cause.

The lynchpin of Sweeten's appeal is its theory that the Board erred by violating Code §§ 2301.454 and 2301.455. (Br. of Appellant 11-15). Sweeten concedes that it does not raise legal error, but only complains about the weight the Board gave to the evidence:

> "Although the Board may consider the circumstances then existing when Volvo Trucks made its decision to reduce Sweeten's AOR, the Legislature requires the Board to focus on the present situation."

(*Id.* at 13).[10]

[10] Sweeten confuses the issue by stating throughout its brief that the Board "refused" or "failed" to consider evidence of the "currently existing circumstances." As shown herein, the Board did not fail or refuse to consider any evidence that Sweeten offered on any of the issues that it raises on appeal. Sweeten is simply dissatisfied with the weight the Board gave to such evidence.

Sweeten argues, without citation to authority, that the Board should have given greater weight to the "currently existing circumstances" than to Sweeten's historical performance in determining whether there is good cause for the modification. (Br. of Appellant 12-15). Because its argument is not supported by the plain language of the Code, Sweeten cobbles together the following interpretation:

- Code § 2301.454 (d) says that the Board "'*shall*' determine if '*there **is** good cause* for the proposed modification.'" (*Id.* at 12) (emphasis original).
- "Is" means "present time—*not* the past." (*Id.*) (emphasis original).
- Code § 2301.455(a) says that the Board "*shall* consider all existing circumstances...." (*Id.*) (emphasis original).
- The dictionary definition of "existing" is "something that exists now." (*Id*. at 13).
- The Legislature, therefore, "impose[d] on the Board the duty to focus on currently existing circumstances...." (*Id.*).

Sweeten's interpretation of the Code fails for a host of reasons:

A. Sweeten's interpretation is contrary to the plain language of the Code.

In a modification case, the Board shall consider "all existing circumstances, including" the seven enumerated statutory factors in determining whether the manufacturer has good cause. (Tex. Occ. Code § 2301.455(a)). According to Sweeten, however, Code § 2301.455(a) requires the Board to focus on the "currently existing circumstances" and give them greater weight than Sweeten's

past sales and service performance. (Br. of Appellant 12-15) (emphasis added). Despite Sweeten's repeated use of the phrase "currently existing circumstances," that is not what the statute says.[11] The statute requires the Board to consider "all existing circumstances," including the seven enumerated factors, but does not refer to "currently existing circumstances" at all and leaves to the Board's discretion the weight given to the evidence. (Tex. Occ. Code § 2301.455). There is no support in the statute for Sweeten's argument that the Board must give more weight to the "currently existing circumstances" than to Sweeten's historical performance, and Sweeten cites no supporting authority.[12] (Tex. Occ. Code § 2301.455(a)).

B. Sweeten's interpretation is contrary to the law.

Sweeten draws the wrong conclusion, but cites the correct cases on statutory construction holding that:

- Agencies derive their authority from statutes and must follow the statutes. *Texas Alcoholic Beverage Comm'n v. Kings Four, Inc.*, 583 S.W.2d 676, 678 (Tex. Civ. App.—Austin 1979, no writ) ("Neither courts nor administrators may rewrite, revise, edit, or amend statutes; that is a function reserved for the Legislature.")
- Courts and agencies have no power to ignore legislative intent expressed by plain and unambiguous language through interpretation. *Bray*, 243 S.W.3d at 685.

[11] *See, e.g.,* Br. of Appellant 5, 6, 7, 13, 14, 15, 16, and 18.

[12] Contrary to Sweeten's argument, the plain language of the Code controls. *See Gen. Motors Corp. v. Bray*, 243 S.W.3d 678, 685 (Tex. App.—Austin 2007, no pet.) (the court and the agency are bound by plain language of statute).

- Courts and agencies must treat statutes as if every word and phrase is deliberately chosen and that words excluded are done so purposefully. *Texas Dep't of Public Safety v. Nail*, 305 S.W.3d 673, 679 (Tex. App.—Austin 2010, no pet.).

(Br. of Appellant 11-12). All of those cases undercut Sweeten's argument which interprets Code § 2301.455(a), contrary to its plain language, to require the Board to give greater weight to the "currently existing circumstances" than to the seven enumerated factors. (*Id.* 12-15). Sweeten's argument pulls "shall" and "is" and "existing" from different Code provisions, blends those words with dictionary definitions not adopted in the Code, and then pours the concoction onto Code § 2301.455(a) to create a duty of the Board to "focus on" what Sweeten calls the "currently existing circumstances." This violates the canon that Courts construe statutes as a whole rather than their isolated provisions. *TGS-NOPEC, Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011).

Sweeten cites no authority for the proposition that the Board had a "duty" to determine good cause based "on current, existing circumstances – *not* on circumstances that no longer exist." (Br. of Appellant 13, 15) (emphasis in original). In fact, Sweeten does not offer even one case where an "existing circumstances" clause has been interpreted as Sweeten suggests.

To the contrary, Code § 2301.455 has been consistently applied by considering the dealer's historical performance, as is plainly necessitated by the enumerated statutory factors, for example:[13]

- *Mr. Yamaha, Inc. v. American Suzuki Motor Corp.*, MVD Docket No. 09-0043 LIC, 2011 WL 577104 at *6 (Tex. St. Off. Admin. Hgs., Feb. 8, 2011) (considering dealer's performance for greater than five-year period preceding the hearing). (Appx. Tab A).

- *Lone Star RV Sales, Inc. v. Motor Vehicle Board of the Texas Department of Transportation*, 49 S.W.3d 492, 494 (Tex. App.—Austin 2001, no pet.) (considering dealer's performance for three-year period preceding the hearing). (Appx. Tab B).

- *Fontana Ford Sales v. Ford Motor Company*, Tex. Motor Vehicle Comm'n, Docket No. 87-084 (1987) (considering dealer's performance for three-year period preceding the hearing). (Appx. Tab C).

- *Fun Motors of Longview, Inc. v. Kawasaki Motors Corp., USA*, Tex. Dep't. of Transp., Motor Vehicle Bd., Docket No. 96-621 (1997) (considering dealer's performance for two-year period preceding the hearing). (Appx. Tab D).

- *Mesa Mack Sales of Midland and Executors of the Estate of Truman O'Neil v. Mack Trucks, Inc.*, Tex. Motor Vehicle Comm'n Proceeding No. 72 (1977) (considering dealer's performance for five-year period preceding the hearing). (Appx. Tab E).

- *Clarence Talley, Inc. v. Volkswagen of America, Inc.*, Tex. Motor Vehicle Comm'n, Proceeding No. 96 (1977) (considering dealer's performance for five-year period preceding the hearing). (Appx. Tab F).

[13] In these cases, the manufacturer was terminating a dealership, not making a modification to the dealer agreement. However, Code § 2301.455 provides the statutory factors the Board must consider in both termination and modification cases. (Tex. Occ. Code § 2301.455).

The Court should reject Sweeten's novel interpretation of Code §§ 2301.454 and 2301.455 because it is not supported by any authority and is contrary to both the plain language of the Code and the Board's prior application of the Code.

C. Contrary to Sweeten's argument, the Board did consider Sweeten's evidence regarding the "currently existing circumstances."

Sweeten repeatedly states that the Board "refused to consider" or "ignored" evidence of the "currently existing circumstances." (Br. of Appellant 12-15). Sweeten does this is an effort to couch its "currently existing circumstances" argument as legal error rather than what it is—a complaint that the Board did not assign such evidence the weight that Sweeten desires. (*Id.*).

Sweeten's entire argument regarding "currently existing circumstances" collapses upon review of the PFD which shows that the Board did consider all of the evidence that Sweeten presented on the "currently existing circumstances." For example:

- Regarding Sweeten's sales, the Board noted that Sweeten was trying to correct its lack of sales efforts in the Removed Counties "over the past year." (2 AR 1915).
- Regarding Sweeten's sales efforts, the Board noted that Sweeten's sales process improved "in the past year." (2 AR 1923).
- Regarding Sweeten's DOS and CSI scores, the Board noted that Sweeten's performance improved for the time period "2014 YTD (as of the hearing)." (2 AR 1921).

- Regarding Sweeten's CSI score, the Board noted that Sweeten's performance improved "[f]or 2014 year to date (as of September 11, 2014)."[14] (2 AR 1923).

- Regarding the adequacy of Sweeten's service department, the Board noted that Sweeten's performance improved as a result of changes "which occurred in early 2014." (2 AR 1922).

- Regarding the adequacy of Sweeten's service department, the Board noted that "Sweeten has undoubtedly made significant strides in the past year...." (2 AR 1923).

- Regarding complaints about Sweeten's service department, the Board noted that Sweeten presented evidence from May and June 2014 that certain customers were "currently pleased with Sweeten." (2 AR 1926).

Thus, the centerpiece of Sweeten's appeal—that the Board refused to consider the "currently existing circumstances"—is false. Sweeten points to no proffered evidence related to its "currently existing circumstances" argument that the ALJ did not admit. Even if the statute could be construed to permit or require the Board to consider evidence arising after the notice of modification, Sweeten cannot show reversible error because the Board did consider all such evidence.

D. Sweeten's interpretation ignores the statutory framework.

Sweeten's interpretation ignores the interplay between Code §§ 2301.454 and 2301.455. Code § 2301.454 requires a manufacturer to give notice to the dealer of a modification and grants protest rights to dealers receiving such notice. (Tex. Occ. Code § 2301.454). If a dealer receiving such notice files a protest, a

[14] This evidence was current during the hearing which was held September 8-15, 2014. (2 AR 1899).

contested case hearing follows and the Board determines whether the manufacturer has good cause for the modification. (Tex. Occ. Code §§ 2301.454, 2301.455).

The manufacturer's reasons for the modification, which naturally arose prior to the notice, are the focus of the good cause inquiry under Code § 2301.455(a). (2 AR 1910-30). As the Board properly noted, "the statutory factors focus on whether there is a legitimate business interest for the modification and the impact such modification will have upon the public and the dealership." (2 AR 1904).

Under Sweeten's interpretation of Code § 2301.455(a), the Board would be needlessly restricted from considering the very evidence that led to the notice of modification. Moreover, the "currently existing circumstances" at the time of trial would not be known at the time a manufacturer is required by the statute to provide notice. Texas courts interpret statutes to avoid absurd results, not to create them. *Jose Carreras, M.D., P.A. v. Marroquin*, 339 S.W.3d 68, 73 (Tex. 2011), *citing City of Rockwall v. Hughes*, 246 S.W.3d 621, 625-26 (Tex. 2008). Construing Code §§ 2301.454 and 2301.455 to require a manufacturer to give a dealer notice of a modification, having a contested case hearing at which the manufacturer bears the burden of showing good cause for the modification, and then restricting the

Board to giving greater weight to the "currently existing circumstances" at the time of trial would be an absurd result.[15]

E. Sweeten's interpretation improperly expands the Code.

Sweeten's interpretation improperly writes into Code § 2301.455 a cure period. (Br. of Appellant 5-6). Sweeten argues "the Legislature requires the Board to consider the '*existing*' circumstances to decide if good cause *currently* exists, so that if the dealer has corrected the problems identified in the required statutory notice or made significant strides in doing so, the Board has a basis for denying the proposed termination or modification." (*Id.*) (emphasis original). Sweeten cites no authority for that proposition because there is none. If the Legislature intended to draft a statute providing that a manufacturer can only modify a dealership agreement if it has good cause and the dealer has not cured "the problems identified in the required statutory notice or made significant strides in doing so," it

[15] Although it is the centerpiece of its appeal, Sweeten never explains what "currently existing circumstances" means. (Br. of Appellant 12-15). If Sweeten means "currently existing" at the time of the hearing, it ignores the fact that the discovery period closed before the contested case hearing began which precludes discovery on the "currently existing circumstances." (2 AR 463-66). If Sweeten means "currently existing" at the time of the hearing before the Board, it ignores the facts that (1) the ALJ closed the administrative record on December 10, 2014, before the Board hearing on November 13, 2015, and (2) the Board lacks statutory authority to consider "currently existing circumstances" that arose after the ALJ closed the administrative record. (2 AR 1810; Tex. Gov't Code § 2001.058(e) (limiting the Board's review of the PFD to legal or technical issues)).

would have done so.[16] *See State v. Shumake*, 199 S.W.3d 279, 284, 286-87 (Tex. 2009) (where text is clear, text is determinative of legislative intent); *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 866 (Tex. 1999) (statutory language is "the surest guide to legislative intent").

F. Conclusion to arguments regarding the "currently existing circumstances.

Sweeten cannot overcome the legal presumption that the Final Order is valid because Code § 2301.455 does not require the Board to give greater weight to "currently existing circumstances." (Tex. Occ. Code § 2301.455(a)). The Board correctly noted that it is not "appropriate to look at a very narrow snapshot in time—*i.e.*, just at the year to date for 2014 as of the hearing—to determine [good cause under the statutory factors]. Rather, the Board looks at the broader time period, particularly the last five years...." (2 AR 1924). Sweeten does not meet its burden on appeal by simply creating its own interpretation of Code § 2301.455, which is not in the statute and has never been adopted by the Board, and then faulting the Board for not applying Sweeten's interpretation.

Moreover, Sweeten has the burden to prove both that the Final Order violated its substantial rights and one or more of the statutory bases for reversal. *Varme*, 262 S.W.3d at 38 ("To warrant either reversal or remand, therefore, the

[16] The Texas Legislature knows how to provide cure periods when that is its intent. For example, Code § 2352.053, applicable to terminations of boat dealership agreements, provides that a manufacturer cannot terminate a dealer without first giving the dealer an opportunity to cure the default stated in the notice. (Tex. Occ. Code § 2352.053).

reviewing court must conclude that (1) substantial rights of the appealing party have been affected because of (2) one or more of the reasons listed in section 2001.174(2)(A)-(F).”). Sweeten, however, has no “substantial right” to have the Board adopt its novel and unsupported interpretation of Code § 2301.455 or to require the Board to give greater weight to evidence that Sweeten considers current. *C.O.N.T.R.O.L. et. al. v. Sentry Environmental, L.P.*, 916 S.W.2d 677, 680 (Tex. App.—Austin 1996, writ denied) (“No harm can be done to a substantial right that never existed.”).

II. Sweeten Fails To Establish Reversible Error As To The Statutory Good Cause Factors.

Sweeten next argues that its “substantial rights” were prejudiced by the Board’s alleged “misinterpretation and violation” of Code §§ 2301.454(d) and 2301.455(a). (Br. of Appellant 15-19). Once again, Sweeten cites no authority in support of its argument. (*Id.*).

Although Sweeten tries to cast its complaints about the Board’s good cause determination as a legal issue, those complaints only go to the weight of the evidence. Sweeten’s arguments do not approach the showing required for it to overcome the presumptions that the Final Order is valid and supported by substantial evidence. *See Buddy Greg*, 156 S.W.3d at 99 (the Court must begin with the presumption that the findings, inferences, conclusions, and decisions of the Board are supported by substantial evidence); *Marathon Coach*, 320 S.W.3d at

925 (the Court should affirm the Final Order even if the evidence preponderates against it, so long as the Court finds a reasonable basis for the decision); *Continental Cars*, 697 S.W.2d at 441 (even as to alleged errors of law, the Court presumes that an agency order is valid and the burden of proving otherwise is on the party challenging the order).

Sweeten cannot overcome those presumptions with its flawed "currently existing circumstances" argument or by ignoring the voluminous evidence that supports the Board's good cause determination.

A. Sweeten's sales in relation to sales in the market.

The Board found that Sweeten's sales in relation to sales in the market support good cause for the modification. (2 AR 1910-15; Tex. Occ. Code § 2301.455(a)(1)). On this statutory factor, Sweeten first argues that the Board did not consider that "Volvo Trucks' market share in Sweeten's AOR had increased significantly in the first six months of 2014." (Br. of Appellant 16). Sweeten does not cite to any record evidence showing an increase in Sweeten's sales in 2014, but cites instead only to the PFD. (*Id.*). Once again, Sweeten asks the Court to find error in the PFD without citing to any record evidence in support of its argument. Even if Sweeten had cited to any such evidence, its argument would go only to the weight the Board gave such evidence, and the Court may not reverse on weight of the evidence. (Tex. Gov't Code § 2001.174).

Sweeten next argues that Volvo Trucks did not have sufficient justification to remove counties from its AOR because, according to Sweeten's expert witness, registrations of Volvo Trucks within the Removed Counties from 2010-2013 were only 8-15 trucks below average.[17] (Br. of Appellant 16). The Board considered and rejected Sweeten's argument. (2 AR 1912-13). Sweeten conveniently ignores the facts and evidence discussed in the PFD demonstrating that there is more than a scintilla of evidence of good cause under Code § 2301.455(a)(1), for example:[18]

- Sweeten's market share within its AOR has been below Volvo Trucks' national average. (2 AR 1911)
- Sweeten's sales in the Removed Counties are "even worse."[19] (*Id.*).
- Sweeten's sales have "lagged behind what is expected for its AOR." (2 AR 1913).
- Sweeten's underperformance in the Removed Counties is "glaring." (2 AR 1914).
- Sweeten's market share in the Removed Counties constitutes "very low numbers." (*Id.*).
- Sweeten's market share in the Removed Counties is "exceptionally low." (*Id.*).

[17] Here, where it perceives a benefit, Sweeten relies on performance data from 2010-2013 rather than on what it defines as "currently existing circumstances."

[18] The record evidence on this factor includes: 3 AR 2259, 285:8-286:3, 286:8-13; 3 AR 2361, 494:24-495:3; 3 AR 2380, 570:18-20; 4 AR 2895, 2901-02, 2914; 4 AR 3631-64. *See also* Findings of Fact 69-75. (2 AR 1937).

[19] Sweeten does not cite to record evidence of an increase in sales in the Removed Counties because there is none.

Sweeten fails to prove any reversible error related to this statutory factor, and the Court should affirm the Final Order.

B. Sweeten's investment and obligations.

The Board found that Sweeten's lack of investment and obligations in the Removed Counties supports good cause for the modification. (2 AR 1915-17; Tex. Occ. Code § 2301.455(a)(2)). Sweeten argues that the Board "ignored in their analysis" Sweeten's overall investment in its dealership and its "recent investment of $300,000.00 in improvements to its facilities…."[20] (Br. of Appellant 16-17). Sweeten must have missed the following analysis in the PFD:

> Sweeten's evidence shows that the value of Sweeten's land and buildings is between $4.5 million and $5 million. Additionally, Sweeten's parts, furniture, fixtures, equipment and other tangible property other than land and buildings are valued at $3.5 million to $4.5 million. Mr. Sweeten testified that he had recently invested $300,000 in improvements and modifications to the facilities, which included the addition of 40,000 feet to the body shop, quick care department, and additional fixtures.

[20] Sweeten's statement that it made "these substantial investments to serve its existing AOR, *not* the drastically reduced AOR described in the final order" is unsupported. (Br. of Appellant 17) (emphasis added). This is another example of Sweeten making unsupported assertions and apparently hoping that the Court will sift through the nearly 25,000 page record to find support. The Court, however, is "not required to sift through the record without guidance from the party to find support for a party's bare assertion of error." *Crider v. Crider*, 2011 WL 2651794 at *5 (Tex. App.—Houston [1st Dist.] 2011, pet. denied); *see also Blake v. Intco Investments of Texas, Inc.*, 123 S.W.3d 521, 525 (Tex. App.—San Antonio 2003, no pet.) (appellate courts are "not required to search the record . . . without more specific guidance").

(2 AR 1915-16).[21]

Sweeten next states that it "recently contracted to buy land in Brookshire, in one of the counties that the final order would take from Sweeten's AOR, in order to build an additional Volvo Trucks facility." (Br. of Appellant 17). The Board considered Sweeten's arguments and concluded that:

> [T]he purchase contract on the Brookshire property arose after Sweeten was aware of and had protested the proposed modification. That this attempted purchase occurred after Sweeten was aware of Volvo Trucks' proposed modification and after the protest had begun leads the ALJ to conclude this property cannot be considered as an investment by Sweeten that may impact the good cause analysis.

(2 AR 1917). Sweeten does not offer any guidance to the Court as to how the Brookshire property should impact review of the Final Order, but it is clear from the PFD that the Board's conclusion is supported by more than a scintilla of evidence.[22] (*Id.*).

Last, Sweeten argues that the Board "refused to consider the adverse impact of Volvo Trucks' planned new Volvo Trucks dealership on Sweeten's investment." (Br. of Appellant 17). The Board did consider the alleged new dealership, and

[21] Sweeten claims that its "recent investments," which Sweeten falsely claims the Board "ignored," are one of its "two main defenses to the proposed modification." (Br. of Appellant 4, 17).

[22] Sweeten does not tell the Court that although it had a contract to purchase the Brookshire property, it had not closed the deal and therefore had not purchased the property at the time of the hearing. (3 AR 2526, 900:6-901:1, 902:7-18; 5 AR 8012).

determined that Sweeten's evidence about it was too speculative to be given weight. (2 AR 1917).

Sweeten conveniently ignores the facts and evidence discussed in the PFD demonstrating that there is more than a scintilla of evidence of good cause under Code § 2301.455(a)(2), for example:[23]

- "There is no evidence of any significant investment by Sweeten into the removed counties that will be impacted by the proposed modification." (2 AR 1916).
- Sweeten has no physical location in the Removed Counties and "has not invested any known amounts for advertising or other services directed toward the removed counties." (*Id.*).
- "The modification will not require Sweeten to take on any new obligations." (2 AR 1916-17).
- "[T]he modification is not adverse to Sweeten's investment and obligations in any way." (2 AR 1917).
- "The fact that Sweeten does not have significant investment or obligations in the removed counties shows Sweeten's lack of commitment to those counties and, as such, supports Volvo Trucks' contention that the removed counties should be taken out of Sweeten's AOR." (*Id.*).
- "In regard to Sweeten's investment and obligation, the ALJ finds no impact at all by the proposed modification. Sweeten will still be able to sell vehicles in the removed counties and provide parts and service." (*Id.*).

[23] Additional evidence on this factor includes: 3 AR 2369, 528:24-529:3; 3 AR 2564, 1051:17-23; 3 AR 2661-64, 1214:22-24, 1218:19-25, 1220:22-1221:9, 1221:15-22, 1222:16-18, 1222:22-1223:9; 1226:8-10; 1266:6-10; 3 AR 2692-93, 1341:20-1342:1; 3 AR 2785-86, 1452:19-1453:8; 1456:5-9; 4 AR 3159-61.

Sweeten fails to prove any reversible error related to this statutory factor, and the Court should affirm the Final Order.

C. The inadequacy of Sweeten's service department and facilities.

The Board found good cause for the modification based on the statutory factor regarding the adequacy of Sweeten's service department and facilities. (2 AR 1920-24; Tex. Occ. Code § 2301.455(a)(4)). Sweeten's admission that the adequacy of its service facilities, equipment, parts, and personnel "was questioned in some respects" is a tacit admission that there is more than a scintilla of evidence on this statutory factor. (Br. of Appellant 17).

Sweeten does not controvert the evidence cited in the PFD in support of the finding of good cause on this statutory factor. Instead, Sweeten's only argument is that the "currently existing evidence" showed an improvement in Sweeten's performance. (Br. of Appellant 17-18). Once again, Sweeten does not explain how its argument impacts the Court's review of the Final Order, but it is clear that Sweeten's complaint is only that the Board did not assign the weight that Sweeten desires to the "currently existing circumstances." The fact that some evidence exists that Sweeten's service department improved just before the hearing is not sufficient to reverse the Final Order where more than a scintilla of evidence exists in the record in support of the Board's findings and conclusions that good cause

exists under Code § 2301.455(a)(4).[24] *Buddy Gregg*, 156 S.W.3d at 99; *Marathon Coach*, 320 S.W.3d at 925.

D. Conclusion to arguments regarding the sufficiency of the evidence on the statutory good cause factors.

Sweeten fails to meet its burden of showing reversible error. Although Sweeten tries to spin its issues on appeal as involving legal error, its arguments only go the weight of the evidence. Because there is more than a scintilla of evidence in the record to support the Board's findings and conclusions on each of the statutory factors, and the Court may not judge the weight or credibility of that evidence, the Final Order should be affirmed. (Tex. Gov't Code § 2001.174).

III. The Board Properly Rejected The Speculative Impact Of A Future Dealership In The Removed Counties.

For its third issue, Sweeten argues that the Board "refused to consider" evidence regarding the possible harm to Sweeten if another Volvo Trucks dealership were established in the Removed Counties in the future. (Br. of Appellant 19-26). Nothing in the Code permits or requires the Board to consider, in a modification case, the hypothetical harm that Sweeten claims it might suffer in the future if another dealership is ever established in the Removed Counties. It is

[24] The record evidence on this factor includes: 3 AR 2147, 58:5-24; 3 AR 2161, 113:8-114:12; 3 AR 2163-64, 124:10-125:20; 3 AR 2293, 422:18-423:6; 3 AR 2296, 434:6-14; 3 AR 2360, 491:10-22; 3 AR 2364, 506:2-8; 3 AR 2380, 570:18-20; 3 AR 2413, 703:21-704:22; 3 AR 2424-38, 746:22-747:9, 753:9-754:10, 761:15-764:25, 768:7-797:12, 798:4-800:5, 802:5-20; 804:5-805:8; 3 AR 2667-68, 1239:14-1245:19; 3 AR 2679-81, 1288:1-13, 1291:10-24, 1294:4-16; 3 AR 2794, 1488:6-20; 3 AR 2800, 1511:8-13; 5 AR 7075-78; 5 AR 7973-77; 6 AR 8023-8514; 8 AR 15467, 142:1-9 (Moroz Dep.); 8 AR 15580-81, 20:23-21:6 (Kirksey Dep.).

not even true that the Board failed to consider such alleged harm, as Sweeten concedes when it notes that the Board rejected Sweeten's argument because the possibility of the second dealership is "too speculative to weigh into the analysis in this case."[25] (Br. of Appellant 24; 2 AR 1917, 1929). Sweeten's arguments related to the second dealership are also foreclosed by *Cardenas* in which the Board held that evidence of future harm related to the establishment of another dealership is not relevant in a modification case.

A. The potential impact of a hypothetical future dealership is not relevant to this modification proceeding.

1. Harm to the protesting dealer is not part of the Code § 2301.455 good cause analysis.

The Court should reject Sweeten's argument that the Board must consider the speculative harm Sweeten might suffer in the future if Volvo Trucks establishes a dealership in the Removed Counties because Sweeten's argument is inconsistent with Code §§ 2301.454 and 2301.455.

The Code sets up a two-step framework for modifications. Before a manufacturer is required to prove good cause for a modification under Code § 2301.455, an "initial determination" is required under Code § 2301.454 as to

[25] While the PFD at times labels evidence on this issue as "not relevant," (*see* 2 AR 1929) the PFD as a whole makes clear that the ALJ did not exclude this evidence or refuse to hear it on relevance grounds, but instead admitted and considered the evidence and decided to give it little or no weight. (2 AR 1917) (evidence of a future dealership is "too speculative to weigh into the analysis in this case"). The ALJ did not rule against the admissibility of any evidence at the hearing on the issue of the second dealership.

whether the modification triggers a protest right for an existing dealer. *Cardenas Enters. v. Toyota Motor Sales USA, Inc., Texas Dep't of Transp.*, Motor Vehicle Division, Docket No. 06-0034LIC, p. 3 (Oct. 17, 2008) (Sweeten's Appx., Tab 1). The burden is on the protesting dealer to prove that the modification would "adversely affect to a substantial degree its sales, investments, or obligations to provide service to the public."[26] *Id*. It is only at this first step that the ALJ considers the adverse impact that the dealer claims it would suffer from the modification. *Id.*

Where, as here, the ALJ finds an adverse impact, the burden shifts to the manufacturer to prove in the second step of the modification analysis that there is "good cause" under Code § 2301.455.[27] Notably absent from Code § 2301.455 is any mention of harm to the protesting dealer. This makes sense because it would be redundant to consider harm a second time in the Code § 2301.455 "good cause" analysis when such harm is a prerequisite to reaching the good cause analysis.

[26] The ALJ placed the burden on Volvo Trucks to prove that the modification would *not* adversely impact Sweeten. (3 AR 2100, 27:4-21). Although Volvo Trucks disagrees with the ALJ's ruling as contrary to *Cardenas* and Code § 2301.454, it is not at issue on this appeal because the Board ultimately found good cause for the modification.

[27] The ALJ found that removal of ten counties from Sweeten's AOR would "on its face" adversely affect Sweet's sales, investment, or obligations. (2 AR 1907-08 (citing *Star Motor Cars Inc. v. Mercedes-Benz of North America*, Tex. Dep't. of Transp., Motor Vehicle Bd., Docket No. 97-683 (June 29, 2000)). Although Volvo Trucks disagrees with the ALJ's ruling as contrary to the evidence, *Cardenas*, and Code § 2301.454, it is not at issue on this appeal because the Board ultimately found good cause for the modification.

Recognizing that harm to the protesting dealer is not an enumerated factor under Code § 2301.455, Sweeten argues, once again without citation to authority, that the speculative harm that it might suffer in the future if another dealership were established in the Removed Counties is an "existing circumstance" that the Board should have considered. (Br. of Appellant 20-21). Sweeten's argument, which finds no support in the plain language of the statute, is sharply inconsistent with Sweeten's "currently existing circumstances" theory. Sweeten insists that "existing circumstances" means the Board must focus on "the present time" and things "that exist now." (Br. of Appellant 12-13). Yet here, Sweeten asks the Court to reverse the Board because it did not adequately consider the hypothetical impact of something that may or may not take place in the future. The Board correctly concluded that the possible addition of a dealership at some unknown point in the future is not an "existing circumstance" under Code § 2301.455. (2 AR 1929).

2. Sweeten cannot borrow the harm factor from Code § 2301.652(b) and apply it in this protest under Code §§ 2301.454 and 2301.455.

The Code gives dealers the right to file a protest action if an application is made with the Division to establish a dealership within a 15-mile radius or within the same county as the protesting dealer. (Tex. Occ. Code § 2301.652(b)). If an existing dealer with protest rights under the Code files a protest, the applicant (not

the manufacturer) bears the burden to prove good cause for establishing a dealership. (Tex. Occ. Code § 2301.652(a)).

The good cause analysis under Code § 2301.652 is governed by seven enumerated factors, one of which is "any harm to the protesting franchised dealer." (Tex. Occ. Code § 2301.652(a)(4)). It is this harm factor under Code § 2301.652(a)(4) that Sweeten seeks to graft onto this modification proceeding arising under Code §§ 2301.454 and 2301.455. (Br. of Appellant 20-21). Sweeten cites no authority to support its argument that the Board can take a single good cause factor applicable only in a protest arising under Code § 2301.652 and apply it to a modification protest governed by the good cause factors in Code § 2301.455.

Sweeten's argument also fails because the Board in this modification protest could not consider all of the factors that it must consider in a protest against the establishment of an additional dealership. (Tex. Occ. Code § 2301.652(a) ("the board shall consider [seven enumerated factors]")). For example, the Board could not determine whether Volvo Trucks is being adequately represented at some future time. (Tex. Occ. Code § 2301.652(a)(1)). Likewise, the Board could not determine the "current and reasonably foreseeable projections of economic conditions, financial expectations, and the market for new motor vehicles in the relevant market area" at the time of a future application. (Tex. Occ. Code § 2301.652(a)(7); *see also Cardenas*, Docket No. 06-0034LIC, at 10 (facts existing

at the time of a modification proceeding are different from facts that would exist at the time of a future establishment protest)). The Board could not even determine what the "relevant market area" would be without a specific location for the future dealership. Moreover, the Board could not consider "harm to the applicant" because there is no applicant in this case. (Tex. Occ. Code § 2301.652(a)(6); *see also Cardenas*, Docket No. 06-0034LIC, at 9-10).

The Code turns Sweeten's unsupported argument upside down. Not only is the Board not required, as Sweeten argues, to consider the hypothetical impact of a speculative future dealership in this modification proceeding, the Board would have exceeded its authority under Code § 2301.455 if it had done so.

B. The Board considered Sweeten's evidence of future harm and determined that it was too speculative to be given any weight.

Because there is no evidence in the record of any plan by Volvo Trucks to establish a dealership in the Removed Counties, Sweeten argues that the Board should have inferred from "common sense" that such a plan existed and then assigned great weight to such inferences. (Br. of Appellant 24-26).

Sweeten, however, is not entitled to reversal merely because the Board did not agree with Sweeten's inferences or give them the weight Sweeten prefers. *Grubbs Nissan Mid-Cities, Ltd. v. Nissan N. Am., Inc.*, No. 03-06-00357-CV, 2007 WL 1518115, at *3 (Tex. App.—Austin, May 23, 2007, pet. denied) (Court may not substitute its judgment for the Board's, and may not judge the weight or

credibility of the evidence); *see also Sanchez v. Texas State Bd. of Med. Examiners*, 229 S.W.3d 498, 510-511 (Tex. App. 2007) (substantial evidence supported agency's conclusion despite conflicting evidence because agency could reasonably determine that one version of events was "more plausible" and the court must resolve evidentiary ambiguities in favor of the agency's decision).

There is sufficient evidence in the record to support the Board's conclusion that "[t]he possibility that Volvo Trucks might franchise a second dealership–while logically likely–is not practically imminent nor specifically planned such that its impact could properly be estimated and determined at this time, nor is it an 'existing circumstance.'"[28] (2 AR 1929). The same evidence also supports the Board's conclusion that Sweeten's attempt to prove a plan for a new dealership and resulting harm was "too speculative to weigh into the analysis in this case" because there was "no evidence regarding where or when such a dealership might open, or what the market for trucks might be" in that place and time. (2 AR 1917; *see also Ford Motor Co. v. Motor Vehicle Board of Tx. Dep't. of Transp., et al.*, 21 S.W.3d 744, 758-59 (Tex. App.—Austin 2008, pet. denied) (the statutory predecessor to Code § 2301.455 "mandates a consideration of 'existing circumstances,' not a

[28] The unrebutted testimony at trial was that: (1) Volvo Trucks does not presently intend to establish a new dealership in the Removed Counties, (2) given the time it will take for Volvo Trucks to effect the modification, it is too early to determine how Volvo Trucks will go about ensuring that the Volvo Trucks brand is adequately represented in the Removed Counties, and (3) Volvo Trucks could ultimately establish a new dealership, assign the Removed Counties to an existing Volvo Trucks dealer, or divide the Removed Counties and assign them in pieces to two or three existing dealers. (3 AR 2792, 1482:1-1483:20).

speculative evaluation of what kind of relationship a manufacturer and dealer might have in the future.").

Thus, even if the Board were required to consider the impact of a potential new dealership, it did consider such evidence and reasonably determined that it was too speculative to be given any weight.[29] (2 AR 1928-29; 30 AR 24193-94). Because the Board's decision was reasonable and supported by sufficient evidence, the Court should affirm the Final Order.

C. The Board properly followed *Cardenas*.

The Final Order is consistent with Board precedent. In *Cardenas*, the manufacturer sought to modify a dealer's franchise agreement to eliminate certain zip codes so that those zip codes could be reassigned to another dealer for the purpose of establishing a new dealership. *Cardenas*, Docket No. 06-0034LIC, at 7-9. Just as Sweeten does here, the protesting dealer in *Cardenas* argued that the Board should have considered, in the modification case, the harm that the dealer claimed would occur upon the establishment of the future dealership. *Id.* at 9-10. The Board disagreed and held that alleged harm an existing dealer may suffer in the future from the establishment of a dealership in the area removed from the

[29] Sweeten's argument that the Final Order is arbitrary and capricious because the Board did not consider "matters the Legislature directs it to consider" fails because the Board did consider all of the evidence Sweeten offered, and Sweeten points to no evidence related to the additional dealership that was excluded at the hearing. (Br. of Appellant 25).

existing dealer's AOR is not relevant in a modification case. *Id.; see also id.* at 37 (Findings of Fact Nos. 108, 109).

Here, the Board followed *Cardenas* and held that the possible future establishment of a dealership in the Removed Counties "is not within the statutory analysis and is too tenuous a basis upon which to make a decision regarding the modification in this case." (2 AR 1904).

Recognizing that *Cardenas* defeats its arguments about the hypothetical future dealership, Sweeten tries in vain to distinguish *Cardenas*. In doing so, Sweeten overstates the importance of the dealer's standing in *Cardenas* to protest the future establishment of a dealership.[30] (Br. of Appellant 21-24). Contrary to Sweeten's argument, the Board's decision in *Cardenas* did not turn on the fact that the dealer would have standing in a future case under Code § 2301.652, but rather on the impossibility of considering the good cause factors under Code § 2301.652 in a modification case governed by Code § 2301.455. *Cardenas*, Docket No. 06-0034LIC at 10.

Sweeten's argument also misses the point that *Cardenas* only considered whether to analyze the potential harm of a future dealership under the adverse impact analysis of Code § 2301.454, not the good cause analysis under Code

[30] In support of its standing argument, Sweeten cites only to a letter from the agency's former Executive Director. (Br. of Appellant 21-22). Aside from the fact that the letter is not part of the *Cardenas* PFD or Final Order, it also explicitly states that the impact of a future dealership "is not the inquiry" in a modification proceeding. (Br. of Appellant, Appx, Tab 3, at 4) (emphasis added).

§ 2301.455. *Cardenas*, Docket No. 06-0034LIC at 8-10. The dealer in *Cardenas* argued that the Board should consider alleged harm from the future dealership in determining whether the manufacturer's action constituted a modification under Code § 2301.454 such that the dealer had the right to protest and have a hearing to determine whether the manufacturer could establish good cause under Code § 2301.455. *Cardenas*, Docket No. 06-0034LIC at 10.

Accordingly, even if *Cardenas* could be construed to mean that a dealer who lacks standing to protest the future establishment of a dealership under Code § 2301.652 can introduce evidence of related harm in a modification case, such evidence would only go to whether the dealer has a right to protest (Code § 2301.454) and not to whether there is good cause for the modification (Code § 2301.455).[31] *Cardenas*, Docket No. 06-0034LIC at 21-22. Here, the Board already found harm for purposes of Code § 2301.454 based on the removal of 10 counties from Sweeten's AOR, and Sweeten was given a hearing on the good cause factors. (2 AR 1903).

Sweeten's arguments regarding the hypothetical future dealership do not raise any reversible error, and the Court should affirm the Final Order.

[31] Sweeten's policy argument regarding the alleged injustice of the modification is not supported by any authority and is contrary to the plain language of the statute. (Br. of Appellant 24). There is no injustice here—Volvo Trucks gave Sweeten notice of the modification, Sweeten filed a protest, the agency provided for a full and fair hearing, and all of Sweeten's evidence on the issue of the second dealership was admitted and discussed in the PFD. If Sweeten is displeased with the statute, its recourse is to lobby the Legislature for change, not to ask the Court to interpret and apply the statute, contrary to its plain language, to suit Sweeten.

PRAYER FOR RELIEF

The Board properly found that Volvo Trucks established good cause to modify Sweeten's AOR under Code § 2301.455. The PFD is supported by more than a scintilla of evidence on each of the applicable statutory factors. Because Sweeten has not met its burden of showing reversible error under Tex. Gov't Code Ann. § 2001.174, Volvo Trucks respectfully requests that the Court dismiss Sweeten's appeal and affirm the Final Order. Volvo Trucks further respectfully requests all other relief to which it may be entitled.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Tex. R. App. P. 9.4(i)(3), the undersigned certifies this brief complies with the type-volume limitations of Tex. R. App. P. 9.4(i)(2)(B). The brief was prepared using Microsoft Word 2010, and according to the program's word count, the brief contains 10188 words, exclusive of the exempted portion in Tex. R. App. P. 9.4(i)(1).

/s/ J. Keith Russell
J. Keith Russell

CERTIFICATE OF SERVICE

I hereby certify that a correct copy of the foregoing document was served by electronic means on August 5, 2016, to the following counsel of record:

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APPENDIX

TAB	DESCRIPTION
A	*Mr. Yamaha, Inc. v. American Suzuki Motor Corp.*, MVD Docket No. 09-0043 LIC, 2011 WL 577104 (Tex. St. Off. Admin. Hgs., Feb. 8, 2011)
B	*Lone Star RV Sales, Inc. v. Motor Vehicle Board of the Texas Department of Transportation*, 49 S.W.3d 492 (Tex. App.—Austin 2001, no pet.)
C	*Fontana Ford Sales v. Ford Motor Company*, Tex. Motor Vehicle Comm'n, Docket No. 87-084 (1987)
D	*Fun Motors of Longview, Inc. v. Kawasaki Motors Corp., USA*, Tex. Dep't. of Transp., Motor Vehicle Bd., Docket No. 96-621 (1997)
E	*Mesa Mack Sales of Midland and Executors of the Estate of Truman O'Neil v. Mack Trucks, Inc.*, Tex. Motor Vehicle Comm'n Proceeding No. 72 (1977)
F	*Clarence Talley, Inc. v. Volkswagen of America, Inc.*, Tex. Motor Vehicle Comm'n, Proceeding No. 96 (1977)

TAB A

2011 WL 577104 (TX.St.Off.Admin.Hgs.)

State of Texas

Office of Administrative Hearings

Mr. Yamaha, Inc. d/b/a Mr. Motorcycle, Petitioner
v.
American Suzuki Motor Corporation, Respondent

SOAH Docket No. XXX-XX-XXXX.LIC
MVD Docket No. 09-0043LIC
February 8, 2011

PROPOSAL FOR DECISION

***1** On April 2, 2009, American Suzuki Motor Corporation (Suzuki or Respondent) notified Mr. Yamaha, Inc. d/b/a Mr. Motorcycle (Petitioner or Mr. Motorcycle) of its decision to terminate the dealer franchise agreement, citing numerous reasons: (1) failure to adhere to warranty and recall obligations; (2) poor sales history; (3) insufficient inventory; (4) failure to employ qualified service and sales personnel; and (5) a history of dissension among the owners. In response to Suzuki's notice of termination, on May 15, 2009, Mr. Motorcycle filed a Notice of Protest of Franchise Termination with the Texas Department of Motor Vehicles (Department). The Department referred the matter to the State Office of Administrative Hearings (SOAH) for a contested hearing.

In referring this matter to SOAH, the Department identified the following issues to be addressed in the hearing:
(1) whether Suzuki violated Sections 2301.453 and 2301.455 of the Texas Occupation Code by terminating or refusing to continue the franchise of Mr. Motorcycle without good cause;

(2) whether sanctions and penalties, if any, should be imposed against Suzuki; and

(3) whether other orders should be imposed against Suzuki to address the protest.

I. RECOMMENDATION

After considering the arguments and evidence presented by the parties, the Administrative Law Judge (ALJ) finds that Suzuki did not violate Section 2301.453 of the Occupation Code, *i.e.* the procedural process for termination, or Section 2301.455 of the Occupation Code, providing good cause for termination. Accordingly, Suzuki has established good cause to terminate the dealership franchise agreement and the ALJ recommends termination of Mr. Motorcycle's Suzuki franchise. Further, because good cause for termination has been determined, sanctions, penalties, and further orders are not appropriate in this case.

II. PROCEDURAL HISTORY, JURISDICTION, AND NOTICE

The hearing on the merits convened on June 8-11, 2010, before Administrative Law Judge Penny A. Wilkov. Petitioner was represented by Attorney Jennifer S. Riggs. Respondent was represented by Attorneys Lloyd “Buddy” Ferguson and Merritt Spencer. After the receipt of the transcript and closing arguments and responses, the record closed on December 23, 2010. [1]

There were no contested issues of jurisdiction or notice in this proceeding. These matters are set out in the findings of fact and conclusions of law without further discussion.

III. OVERVIEW OF THE TERMINATION PROCESS

Generally, the purpose of the regulations related to the distribution and sale of motor vehicles is to protect the welfare and public interest of its citizens and the general economy of the state. [2] A sound system of selling and distributing vehicles is vital to accomplish this purpose, including the regulation of manufacturers, distributors, and dealers of motor vehicles. [3]

***2** By definition, a franchise is created by a contract between a franchised dealer and a manufacturer allowing the dealer to: sell and service new vehicles; become a component of the manufacturer's distribution system; represent and associate with the trademark, tradename, and symbol; rely on the manufacturer for the supply of vehicles, parts, and accessories; and adhere to any right, duty, or obligation imposed by law. [4]

A manufacturer may terminate an existing franchise under only three circumstances: (1) the dealer gives informed consent to terminate; (2) the appropriate time for a dealer to file a protest has elapsed; or (3) the Motor Vehicle Board (Board) of the Department has made a determination of good cause. [5] A manufacturer who intends to terminate a franchise must provide written notice by registered or certified mail to the dealer and the Board stating the specific grounds. [6] The notice must be received not later than the 60 th day before the termination and must notify the dealer that it has the right to file a protest and have a hearing. [7] A franchised dealer may file a protest with the Board not later than the 60 th day after the date of the receipt of the notice of termination. [8] The Board then notifies the party seeking the termination that a protest has been filed and a hearing is required. [9]

Good cause for termination of the franchise is established by the following factors: [10]
(1) the dealer's sales in relation to sales in the market;

(2) the dealer's investment and obligations;

(3) any injury or benefit to the public;

(4) the adequacy of the dealer's service facilities, equipment, parts, and personnel in relation to those of other dealers of new motor vehicles of the same line-make;

(5) whether warranties are being honored by the dealer;

(6) the parties' compliance with the franchise agreement, except to the extent that the franchise conflicts with the law; and

(7) the enforceability of the franchise agreement from a public policy standpoint, including issues of the reasonableness of the franchise's terms, oppression, adhesion, and the parties' relative bargaining power.

Good cause is not established by the desire of the manufacturer for increased market penetration. [11]

IV. PROCEDURAL PROCESS FOR TERMINATION

A. Whether Suzuki violated Section 2301.453 of the Occupation Code

Section 2301.453 imposes various procedural requirements for termination or discontinuance of a franchise. A protest is considered timely if it is filed with the Board not later than the 60th day after the date of the receipt of the notice of termination. After a timely protest is filed, the Board must notify the party seeking termination that a timely protest has been filed, a hearing is required, and that the party may not terminate the franchise agreement until a final order is issued. [12] After a hearing, the Board shall determine whether the party seeking termination has established by a preponderance of the evidence that there is good cause for the proposed termination. [13]

***3** The evidence in the record shows the following. On April 2, 2009, Suzuki notified Mr. Motorcycle of its decision to terminate the dealer franchise agreement, citing the following reasons: (1) failure to adhere to warranty and recall obligations; (2) poor sales history; (3) insufficient inventory; (4) failure to employ qualified service and sales personnel; and (5) a history of dissension among the owners. In response, Mr. Motorcycle filed a timely Notice of Protest of Franchise Termination with the Department.

On May 19, 2009, the Department referred the case to SOAH to conduct a hearing on the merits. The referral stated that the Department would not be a party to the proceeding. On May 26, 2009, the Department issued a letter and a notice of hearing to the parties. The Department informed Suzuki that Mr. Motorcycle had filed a formal protest against Suzuki alleging that Suzuki had violated these provisions of the Code. The Department also notified the parties that the Department had the authority to impose a civil penalty of $10,000 per violation per day, after considering the seriousness of the violation, economic damage caused by the violation, and other factors. [14]

B. ALJ'S Analysis

Neither party raised any issue concerning whether Suzuki violated Section 2301.453 of the Occupation Code. The ALJ, therefore, concludes that Suzuki did not violate the procedural portion of Section 2301.453.

V. THE DEALERSHIP

A. The Franchise Agreement

Suzuki began its affiliation with Mr. Motorcycle on December 2, 1993, when identical twin brothers, Tracy and Michael McIntyre, signed a Suzuki Products Dealer Agreement to operate the Suzuki franchise in El Paso, Texas. Simultaneously, the parties entered a Performance Agreement outlining Suzuki's expectations concerning sign placement, sales, advertising and showroom space.

Relevant terms of the dealer agreement include: [15]
Purpose. The purpose of the Agreement is to establish a good working relationship between Suzuki and its Dealer. Suzuki expects that Dealer will actively, aggressively and honestly promote the sale of Suzuki products with prompt, efficient, and courteous service used to preserve and promote Suzuki products;

Dealer's Responsibility. Dealer will use its best efforts to sell Suzuki products at retail;

Ownership and Management. Tracy McIntyre and Michael McIntyre are named as the sole legal owners with full authority and responsibly for the operation and management;

Dealer's Sales Responsibility. Dealer agrees that the best method of measuring its market share is by comparison of its sales against the national, state, county and local areas sales percentages in the product categories;

Inventories. Dealer shall maintain at all times a minimum inventory of Suzuki products for display, demonstration, and sale. A minimum inventory is the quantity and models necessary for a sixty-day supply, based on the current Dealer sales plan but subject to availability;

***4** *Service Personnel*. Service personnel must be competent and properly trained to handle all service work of Dealer's customers;

Recall and Safety Procedures. If the dealer receives from Suzuki any notification of a recall or other safety or product improvement campaign, the Dealer must comply with it; and

Co-operative Advertising Program. Dealer will participate in Suzuki's cooperative advertising program in accordance with Suzuki's Co-op Policy.

Contemporaneously with the Dealer Agreement, Suzuki and Mr. Motorcycle entered into a Performance Agreement that set out sales requirements for the dealership. [16] The parties agreed that the dealership would maintain quarterly retail sales equal to the percentage of Suzuki products sold nationally as determined by R. L. Polk. The parties also agreed that Mr. Motorcycle would maintain equal showroom space for Suzuki motorcycles and ATVs as compared to other brands.

Mr. Motorcycle represents numerous other product lines in the motorcycle and All-Terrain Vehicle (ATV) category, including Yamaha, Suzuki, Polaris, Triumph, Houzo, Madami Hyosung, Ducati, Victory, KTM, Kasea, Cagiva, Xtreme, Lifan, Kinli, Daelim, United Motors, Alpha Sports, MV Augusta, Husqvarna, Moto Guzzi, Arctic Cat, and Aprilia [17] Until 2009, all of Mr. Motorcycle's corporate stock was owned in equal shares by Tracy McIntyre and Michael McIntyre. In 2009, however, as the result of a dispute and Michael's desire to join the Christian ministry, Tracy McIntyre bought the entire company for $1.5 million.

B. Mr. Motorcycle's Competition, Santa Teresa Motorsports

In 2005, Suzuki signed a similar dealer agreement with a competing Suzuki motorcycle dealership, Santa Teresa Motorsports (Santa Teresa), located in Sunland Park, New Mexico, approximately 13 miles from Mr. Motorcycle, and 100 yards outside of the El Paso, Texas, county line. Because the dealership is located in New Mexico, Mr. Motorcycle could not request a denial of license application hearing permitted by Section 2301.652 of the Occupation Code. [18] Santa Teresa was identified by both parties as the source of the parties' increasingly strained relationship.

VI. CONTESTED ISSUES

The key issue argued by both parties was whether declining sales were attributable to Mr. Motorcycle's operational issues or Suzuki's business practices. Suzuki contends that Mr. Motorcycle failed to aggressively promote and sell its products, culminating in Suzuki's decision to enter into a franchise agreement with Santa Teresa to stem market share erosion. Suzuki alleges that after Santa Teresa was established, Mr. Motorcycle retaliated by decreased product orders and poorly treating its sales representatives. Mr. Motorcycle disagrees, contending that declining sales are attributable to the national recession, difficulty in obtaining Suzuki product, Suzuki's less favorable pricing and programs, and the opening of Santa Teresa.

***5** Another source of conflict was whether New Mexico sales tax laws offer sufficient incentive for consumers to drive to Santa Teresa to avoid the Texas 8.25% sales tax. Suzuki argues that motorcycles and ATVs purchased in New Mexico must be titled in Texas, with a use tax collected when the vehicle is titled. Mr. Motorcycle asserts that New Mexico dealers are neither required to collect sales tax nor disclose to the consumer that a sales or use tax must be collected upon titling in Texas. Further, there was a disagreement between the parties concerning whether off-road ATVs must be titled.

Lastly, a recurring issue was whether the deteriorating relationship between the two brothers had bled into the business relationship between Suzuki and Mr. Motorcycle. Suzuki points to the prevention of its sales representative from making sales calls to the dealership with threats of summoning the police; that the parties' only communications were in writing; and that the brothers' infighting resulted in protective orders and assaultive behavior at the dealership. Mr. Motorcycle agrees that there was discord between the Suzuki representative and management, but it states that the issue has been resolved and communication has greatly improved.

The ALJ addresses each of the contested issues within the framework of the good cause for termination analysis.

A. Mr. Motorcycle's Sales in Relation to Sales in the Market

1. Standard for Evaluating Sales

In order to determine Suzuki's sales relative to the market, Suzuki relied on data from two sources: the Motorcycle Industry Council (MIC) dealer database and the MIC warranty registration database. The MIC is a cooperative of sixteen major motorcycle manufacturers, including Suzuki, that share and track dealer sales and warranty registration information. The MIC dealer database is smaller because it only incorporates cooperating dealer's locations and sales. The MIC warranty registration database is broader because it collects buyer, product, and sales location based on warranty registrations. For instance, Harley Davidson does not participate in the dealer database but is included in the warranty registration database. The sales analysis relied on by Suzuki is based exclusively on the MIC data from both sources.

Mr. Motorcycle, however, takes issue with the use of the MIC data as the source for the sales analysis by Suzuki. Mr. McIntyre testified that when the performance agreement was signed, the only recognized reporting agency in existence at the time was R.L. Polk, which is independent of the manufacturers and therefore more objective. [19] Although Mr. McIntyre testified that he never agreed to substitute MIC data for R.L. Polk, he conceded that Suzuki had been relying on MIC data for years. The parties, however, raised doubt about whether R. L. Polk still collects motorcycle data. [20]

Because the parties seemed to acquiesce to the use of MIC data throughout their relationship and there was no evidence provided that R. L. Polk still collects motorcycle data, the use of the MIC data will be probative of the issues.

2. Sales Analysis

***6** Suzuki's expert witness, Lawrence Daniel, an information systems consultant with Conclusive Marketing, analyzed the MIC data from the Greater El Paso area, composed of five surrounding counties, including parts of New Mexico. The Suzuki dealerships in the Greater El Paso area are:
(1) Mr. Motorcycle;

(2) Las Cruces Motorsports located in Las Cruces, New Mexico (NM), established in 1997, and situated 40.3 miles from Mr. Motorcycle, with major product lines of Honda, Kawasaki, and Suzuki;

(3) Santa Teresa, which shares a common owner with Las Cruces Motorsports, with major product lines of Suzuki and Polaris; and

(4) Southwest Suzuki located in Alamogordo, NM, established in 1996, and situated 90 minutes north of Mr. Motorcycle, with a major product line of Suzuki. [21]

Based on an MIC data analysis, Mr. Daniel was able to extrapolate the following information: [22]

Regional Dealer Sales of Suzuki Motorcycles and ATVs (2004-2008)

Dealership	2004	2005	2006	2007	2008
Mr. Motorcycle	290	244	149	133	70
Southwest Suzuki	136	139	134	123	94
Las Cruces Motorsports	262	244	237	201	202
Santa Teresa Motorsports	NA	53	316	310	264

His conclusions, based on the data, were as follows:
From 2004 until 2008, Mr. Motorcycle's sales steeply declined from 290 motorcycles and ATVs (units) sold in 2004 to 70 units sold in 2008;

Las Cruces Motorsports showed a relatively steady sales level from 262 units sold in 2004 to 202 units sold in 2008;

Mr. Motorcycle's ATVs sales have dropped from 74 sold in 2004, 12 sold in 2007, and three sold in 2008; [23]

Santa Teresa showed a dramatic increase in sales from 52 units sold at the inception of business in 2005 to 264 units sold in 2008; and

Southwest Suzuki showed steady sales from 136 units sold in 2004 to 94 units sold in 2008.

Mr. Daniel testified that he calculated the sales within a specific geographical area by correlating the MIC sales data with the zip codes in the Greater El Paso area. He concluded that although Mr. Motorcycle appears to have a geographically advantageous position due to its convenient location, customers are traveling greater distances for sales. [24] He explained that distance is a factor to a consumer, but other aspects such as advertising, pricing, service, selection, or warranty work with a dealer are also important in dealer selection. [25] Increasingly from 2005-2009, Santa Teresa has been selling all over Greater El Paso, even though it is locationally disadvantaged by 13 additional miles to travel. [26] According to Mr. Daniel, Mr. Motorcycle's facilities are very favorably located, at the confluence of several major routes and located in a demographic where people are purchasing the motorcycles. [27] Despite the advantage of being in business for many years, increased signage, and community presence, potential Mr. Motorcycle customers are driving the extra distance to New Mexico to make the sale. [28]

***7** Mr. Daniel conceded that although all sales, including Suzuki brands, have declined in recent years, Mr. Motorcycle's sales have dropped precipitously. As far as market trends in a recessionary economy, Mr. Daniel's analysis suggests that the sales decline has occurred in every dealership from 2005-2009, with Mr. Motorcycle's sales dropping 76%; Southwest Suzuki's declining 31%; Las Cruces' dipping 23%; and Santa Teresa's falling 16%. [29]

Although all ten of the most populous Texas counties had declining Suzuki sales, El Paso County has experienced one of the largest declines: [30]

Suzuki Market Share Trends Relative to the Largest ATV/ MC Counties by Percentage (Based on Warranty Registrations)

County	2004	2005	2006	2007	2008	2-year trend (2006-2008)	4-year trend (2004-2008)
Bexar	10.2%	13.7%	13.4%	12.6%	11.3%	-2.1%	1.1%
Dallas	12.9%	11.7%	13.4%	12.2%	10.4%	-3.0%	-2.5%
El Paso	14.3%	14.2%	14.9%	11.8%	9.3%	-5.5%	-5.0%
Harris	11.5%	12.8%	13.7%	12.7%	12.5%	-1.2%	1.0%
Travis	8.7%	9.7%	14.4%	9.9%	13.1%	-1.4%	4.4%

Suzuki points out that from 2006 to 2008, El Paso's market share was down 5.5%, as compared with Dallas County, down 3.0 %, and Harris County, down 1.2%. [31] Further, in ranking 24 Texas and New Mexico counties with 2008 sales volumes totaling at least 1,000 ATV and motorcycle registrations, El Paso County has fallen from the fourth ranking out of the 24 counties in total market share in 2004 to the thirteenth ranking out of the 24 counties in 2008. [32] Nonetheless, Mr. Daniel noted that Honda and Yamaha have benefited from Suzuki's declining market share, significantly increasing their sales. [33] Specifically, Honda has increased its market share in El Paso from 22.0% in 2004 to 29.0% in 2008, while Yamaha has increased its market share in El Paso from 17.0% in 2004 to 19.0% in 2008. [34]

***8** Mr. Daniel agreed that the sales comparisons did not include other factors that impact consumer decisions such as pricing, credit terms, advertising, product availability, or recalls. [35] He agreed that Mr. Motorcycle's sales decline could be due to the competition from New Mexico dealers, if they were not obligated to collect 8.25% sales tax from Texas residents.

3. Display of Suzuki Products

Kevin Michael Conroy is the Suzuki Western Regional Manager, responsible for managing the nine district sales managers in the Western United States, including New Mexico and Texas, with Suzuki's motorcycle and ATV product lines. According to Mr. Conroy, Suzuki had issues with Mr. Motorcycle since 2002, concerning orders, sales, and competition with other dealerships. Mr. Conroy was instrumental in the decisions to enter into the Santa Teresa franchise agreement and to propose termination of Mr. Motorcycle's agreement. Mr. Conroy noted a number of failures that precipitated the termination proposal.

Of prime importance to Suzuki was Mr. Motorcycle's failure to maintain the minimum inventory required by the dealer agreement, *i.e.* the quantity of models necessary for a 60-day supply. [36] He testified that Mr. Motorcycle regularly carried less than one month of ATV supply available. [37] He explained that product display is critical in a multi-line dealership because it allows a side-by-side comparison, and this is particularly true with ATVs, which account for almost half of Suzuki's national sales. Mr. Conroy testified to the following incidents of inventory noncompliance during various visits made to the dealership: (1) only two Suzuki ATVs out of 55 other ATV brands on display; (2) one to three ATVs on display, although equal representation with other lines would have been 10-12 ATVs; and (3) only one Suzuki ATV out of 59 other ATV brands on display. [38]

Mr. Conroy pointed out, however, that Mr. Motorcycle was succeeding with the display and sales of other brands. In 2007, Mr. Motorcycle was named "ATV Dealer of the Year" by Arctic Cat, while the same year, it sold only 12 Suzuki ATVs. [39] Suzuki also points out that Mr. McIntyre testified that each year from 2005 to 2007, the dealership had a successful year, with Honda and Yamaha gaining sales in El Paso County.

Mr. Motorcycle disagreed that it failed to prominently display Suzuki products. Mr. McIntyre testified that he would routinely display 1,000 different brands, categories, and engine sizes, allowing the consumer to choose the product for their needs. He experienced, however, the following difficulties: (1) other dealerships were getting the most popular models earlier; (2) ATVs were frequently back-ordered, so he could not display the product; and (3) inventory was not accurately listed on the Suzuki reports, so it appeared that he had less than the required inventory. [40]

***9** Further, Mr. Motorcycle argued that according to the agreement, market share is measured by comparison with national, state, county, and local sales percentages as determined by R. L. Polk, although Suzuki uses MIC for the sales data. [41] If a neutral database source had been used then the statistics might have shown more favorable results.

4. Allocations and Availability

Another vital issue in the termination decision, according to Mr. Conroy, was Mr. Motorcycle's failure to adhere to the sales responsibility provision in the performance agreement to maintain quarterly retail sales equal to the percentage of Suzuki products sold nationally. [42] He explained that Suzuki products are obtained through allocation, based on an apportionment system designed to replenish a dealer's inventory and anticipate future sales. Once allocated product is apportioned and delivered, dealers can then order additional product only based on availability. [43] According to Mr. Conroy, Mr. Motorcycle frequently failed to adhere to sales and allocation rules by curtailing allocations, by substituting handwritten terms and conditions on the pre-printed order forms, and by canceling shipped orders at great expense to Suzuki. [44]

Mr. Conroy speculated that Mr. McIntyre began curtailing orders in retaliation for Santa Teresa. Specifically, in 2005, Mr. McIntyre called and threatened to set up a competing Honda dealership in New Mexico and put Santa Teresa out of business, which would cause Mr. Conroy to lose his job. [45] After the conversation, Mr. Conroy noticed that Mr. Motorcycle began to reduce its product orders. [46] For instance, shortly after Santa Teresa opened, Mr. Motorcycle ordered two ATVs and 45 motorcycles during the June 2005 allocation period, the only opportunity to order 2006 products, although 66 ATVs and 206 motorcycles had been ordered the previous year.

In response, Suzuki sent a series of three letters. The first letter, dated July 22, 2005, inquired whether Mr. Motorcycle had lost confidence in the product by placing a small order and whether termination was desired. [47] Although the termination was declined, no further explanation was offered for the reduced order by Mr. McIntyre. [48] The next letter, dated October 7, 2005, noted that the sales requirement was violated because Suzuki's records showed only four ATVs in inventory. [49] On January 18, 2006, Mr. Conroy visited the dealership and confirmed that there was only one Suzuki ATV on the floor out of 60 ATVs displayed. [50]

The last letter, sent in June 2006, cited a breach of the minimum annual sales volume provision. [51] Specifically, the letter outlined a record of the ATV allocation orders which reflected minimum orders: in June 2005, only two units were ordered out of 48 allocated; in January 2006, zero orders were placed out of 36 units allocated; and in October 2005, ten units were ordered out of 32 allocated. The letter also pointed out that sales had had declined 20% over three years while El Paso's population increased 4% over the same period; that Suzuki ATV sales had increased regionally and nationally; and that the El Paso market penetration declined from 58% in December 2004 to 49% in December 2005. The letter set

out a requirement to mitigate the sales-requirement breach: sell 29 ATVS within 180 days. However, as of December 19, 2006, Mr. Motorcycle had sold only eight motorcycles and one ATV. [52]

***10** Ashley Vaughn, the Suzuki District Sales Manager since 2006, testified that his sales responsibilities included product placement, marketing, advertising, and staffing in Arizona, Nevada, Utah, New Mexico, and El Paso, Texas. Mr. Vaughn testified that Mr. Motorcycle would place very minimal orders of ATVs by "cherry picking" the hot selling items, such as the GSX-R sports bike, at the expense of the ATVs and other products. [53] The manufacturer, however, required that the dealers carry all 60 models produced.

Besides the alleged retaliatory curtailment of orders, Mr. Conroy also testified that Mr. Motorcycle began substituting and changing terms and conditions on the order forms. He testified that none of the other 330 Suzuki dealers modified the order forms. After Suzuki received order forms with handwritten conditions and terms on it, letters were generated by Suzuki rejecting the changes and canceling the orders. This occurred on July 28, August 8, and November 6, 2008. [54] When Mr. Motorcycle did not return the signed form without modifications, no product was shipped. According to Mr. Conroy, the only communication between the parties was by certified mail. No telephone contact was occurring.

Last-minute cancellations were another issue dating back to 2002, according to Mr. Conroy. Specifically, in 2002, Suzuki began requiring Mr. Motorcycle to put all orders in writing as the result of cancelled orders where a loaded truck would be refused at the dealership. Suzuki would then have to ship the product to a warehouse for storage or to another dealer willing to accept the shipment. [55] In March 2002, Suzuki sent Mr. Motorcycle a letter expressing concerns with cancellation of product, not taking allocated orders, and not taking phones calls from Suzuki sales staff. [56]

Mr. McIntyre disagreed that the dealership was not ordering product, but instead blamed Suzuki's failure to make adequate product available. Mr. McIntyre explained that the allocation process has changed dramatically since 1993, evolving from a telephone call, to mail, to e-mail, and now computer order programs, and from semi-annual to annual allocation. [57]

Frequently, there are huge backlogs where product is not received, according to Mr. McIntyre. For instance, in September 2005, Mr. McIntyre recalled ordering 2006 model product, but because of backlogs, it never shipped. Then, in August 2006, Suzuki discussed substituting the 2007 model for the backorder. [58] He testified that the unavailability of Suzuki product impacts his business because he may not order other Yamahas or Hondas when he is expecting so much Suzuki product. Mr. Motorcycle also argued that the product backorder negatively impacted sales figures. Specifically, in March 2004, there were 74 motorcycles and 10 ATVs on backorder; in August 2005, 39 motorcycles and 3 ATVs on backorder; on January 2006, 119 motorcycles and 10 ATVs on backorder; and in July 2006, 81 motorcycles and 9 ATVs on backorder. [59] Mr. Motorcycle points out that the back orders invalidate Suzuki's argument that product was not being ordered.

***11** Further, the backorder affects other offers from Suzuki. [60] For instance, Suzuki offers a dealer "free flooring" if it accepts 100% of the allocation. Mr. McIntyre explained that free flooring amounts to free credit because a dealer will get interest-free and payment-free product to sell without dealer cost. Traditionally, the free flooring deals run from October to February to sell new models, but with backorders until January, the dealer would have only one month free flooring. [61]

As to substituting terms and conditions on the order forms, Mr. McIntyre testified that the forms had changed and he did not agree that Suzuki had the right to substitute product. [62] Instead he added handwritten language that if the product could not be delivered as ordered, then he wanted to cancel the order rather than accept unordered product. [63]

Mr. McIntyre also testified that he historically accepted 100% of the allocations, but not when Suzuki sent unordered product with his orders. [64] Suzuki would require that the entire shipment be unloaded or it would be returned and that is the reason he rejected the shipment. Also, although the slow-selling product was already in inventory, Suzuki would allocate more slow-selling product. [65]

5. Competition from Dealerships and Manufacturers

Mr. Motorcycle argued that Santa Teresa has profoundly affected the business, because consumers can save 8.25% by just driving 13 miles. Even Suzuki's expert witness, Mr. Daniel, conceded that price is a significant factor of consumer behavior. [66] Thus, Santa Teresa could offer product at a lower price and Mr. Motorcycle would have had to sell at a loss to compete with what amounted to an 8.25% price break. Further, Suzuki gave preferential treatment to Santa Teresa, including giving them the hottest selling models and colors. [67] Meanwhile, if Mr. Motorcycle did not accept its allocation and unwanted product, it would not have the order filled promptly.

Mr. Motorcycle cites the lack of competitiveness with other brands as another reason for declining Suzuki sales. Other manufacturers discount 30-50%, offer rebates or pricing concessions, and give dealer incentives. [68] For instance, Honda made major concessions to move its product, while Suzuki cut production and raised prices, according to Mr. McIntyre. [69] When the Japanese Yen fluctuated downward, Honda and Yamaha lowered prices with rebates while Suzuki kept its prices the same. [70]

Financing offers gave other manufacturers an additional competitive edge, according to Mr. McIntyre. Honda has its own financing source, American Honda Finance, and a secondary source, GE, with higher approval rates and lower terms. Yamaha has HSBC, which offers financing with low credit scores and lower payments. Suzuki, however, has had to rely on secondary sources which require higher credit scores. [71] Since Mr. Motorcycle is a multi-line dealer, Suzuki faced stiffer competition with financing, rebates, and prices.

***12** Advertising is competitive also and there are different dealer incentives offered by various manufacturers. Honda offered $10,000 in advertising dollars to have a give-away program at the mall. Other manufacturers gave dealers 100% reimbursement for advertising, known as co-op programs. Suzuki, however, only reimbursed 50% of the advertisement and paid it three months later, as long as the guidelines and rules were followed. [72]

Mr. Conroy testified, however, that the underperformance of Mr. Motorcycle was a critical factor in his decision to establish the Santa Teresa dealership. For instance, in 2004, prior to opening Santa Teresa, a report showed that Mr. Motorcycle was only selling 57% of the ATVs registered in El Paso County, with the rest coming from outside El Paso County. [73] A similar report in April 2005 revealed a three-year history of decline in ATV sales from 74 sold in 2003 to 16 sold in 2005. [74] Further, Mr. Conroy testified that in March 2004 and December 2004, Mr. Motorcycle was ranked last in a customer service index on sales and service in the district and was ranked below the national and regional average in market share. [75] Suzuki also pointed out that their data showed the population was migrating to New Mexico due to lower housing costs, employment opportunities, and state taxes. [76]

Suzuki took issue with Mr. Motorcycle's assertion that Santa Teresa enjoyed a distinct advantage in the market because it does not have to collect sales tax from Texas residents. Instead, Suzuki argues that motorcycles, ATVs, and other motor vehicles are required to be titled in Texas and, as such, required to pay a “use tax” comparable to sales tax. [77] Although a buyer does not pay sales taxes in New Mexico, and the dealership has no obligation to collect the tax, the purchaser

must pay a use tax on the purchase price of the vehicle when the vehicle is titled in Texas. [78] Further, Mr. Motorcycle's sales manager, Josh Evans, conceded that it had obtained product earlier, or exclusively, on several occasions. [79]

Suzuki disagreed that competition from other brands impacted Mr. Motorcycle's Suzuki sales. Suzuki pointed out that other dealerships throughout the country faced similar pressures from other product lines such as Honda and Yamaha. Yet there was no showing that these pressures affected other dealers in which Suzuki was more competitive, particularly where dealers took advantage of advertising and promotion of products. Suzuki further disputed that its advertising program was flawed, and it pointed out that Mr. Motorcycle failed to use Suzuki's co-op advertising funds since December 2006. [80]

6. ALJ's Analysis

The evidence and testimony showed growing mistrust and communication difficulties between the parties and its impact on sales, display, allocations, and competition. The suspicion and mistrust grew to the point where: (1) the parties only communicated in writing; (2) the Suzuki sales representative was barred from visiting the dealership; and (3) the parties believed that each was intentionally harming the other's sales and product orders. This aspect of the case, among others, supports a finding that good cause exists for terminating the franchise.

***13** Each party offered reasons for the intentional infliction of financial damage by the other party. Mr. Conroy testified that when he visited the dealer he saw very little product displayed in comparison with other brands, which he stated was deliberate. He also noted that allocated product was not being ordered as it had been in the past and speculated that this was in retribution for Santa Teresa. Failure to communicate was cited as the reason for the refusal of the truckloads of product shipped to the dealer and order forms that were changed and rejected. The letters sent by Suzuki documented a pattern of failure to abide by the franchise agreement. Suzuki established that Mr. Motorcycle was intentionally damaging its brand.

Mr. Motorcycle, however, had similar issues of suspicion and mistrust of Suzuki. Mr. McIntyre testified that Suzuki was giving the best product to Santa Teresa because Santa Teresa was selling and ordering more products. He testified that he was displaying the product and that Suzuki was intentionally misrepresenting the amount displayed. Mr. McIntyre testified that Suzuki was deliberately shipping unordered products, leading him to change forms and reject shipments. Mr. McIntyre also pointed to Suzuki's operational issues, such as failure to match rebates, provide financing options for credit-challenged customers, and less lucrative advertising incentives to the dealer.

The evidence supports a finding that Mr. Motorcycle failed to maintain market share by actively under-ordering and under-selling product. It is noteworthy that the curtailment of Suzuki display and orders fell dramatically at Mr. Motorcycle after Santa Teresa was established in April 2005. Mr. McIntyre's claim that consumers were lured to Santa Teresa is not supported by the evidence. In fact, Mr. Motorcycle's behavior contributed to the downturn by not ordering and displaying sufficient product to compete with the other dealerships. The criticism about product unavailability centered on the popular models, with even Mr. McIntyre conceding that slow-selling product was always available.

Suzuki correctly determined that Mr. Motorcycle was not aggressively marketing or selling the product as measured by declining sales and market share. In response, Suzuki awarded the dealership in Santa Teresa. This was seen as a retaliatory move by Mr. Motorcycle. Then Mr. Motorcycle stopped ordering product as it usually did. The paucity of ordering was cited as damaging to the El Paso market and prompted Suzuki to conclude that Mr. Motorcycle would not be promoting or selling Suzuki products.

The evidence supports Suzuki's position as to the reasons for declining sales. The time frame coordinates with Mr. McIntyre's hostile conversation with Mr. Conroy, threatening to open a competing dealership in New Mexico and put

Suzuki out of business. Product ordering and displaying dropped dramatically after this conversation. Mr. McIntyre should have or must have been aware that there would be repercussions for such a drastic reduction in inventory and sales. Any sales or use tax advantage enjoyed by Santa Teresa would not impact Mr. Motorcycles display or inventory of product, especially when a use tax would be due in Texas.

***14** The ALJ concludes that Suzuki has established that Mr. Motorcycle's poor sales in relation to the market provide good cause for termination. The evidence shows that the Mr. Motorcycle's sales in the El Paso market have dropped precipitously, compounded by Mr. Motorcycle's insufficient product in the showroom and lack of aggressive marketing, as well as other operational issues.

B. Mr. Motorcycle's Investment and Obligations

The statute requires an analysis of the dealer's investment and the dealer's financial obligations in regard to that investment. There was relatively little testimony and argument concerning this prong of the analysis.

1. Financial Records

Mr. McIntyre testified that he was not able to provide year-end reports, financial statements, and financial summaries because Mr. Motorcycle's financial accounting system is outdated and does not break down the information by brands. [81] Also, because invoices are kept chronologically and not by brand, Mr. McIntyre claimed no knowledge about the dealership's profit or accounting method. [82]

Suzuki argued that without financial statements it was impossible to ascertain the dealer's investment and obligations. Mr. Motorcycle, furthermore, has 20 different brands and elimination of one line will not mean the dealer will cease to exist. Suzuki pointed out that Mr. McIntyre testified that 2007 was his best year ever, although Suzuki sales had dropped at Mr. Motorcycle by 54 percent compared to 2004, and only 12 Suzuki ATVs were sold in 2007. Suzuki stressed that Honda and Yamaha provide increased revenue, sufficient to compensate for the loss of Suzuki. [83]

2. Investment by Mr. Motorcycle

Mr. Tracy McIntyre testified that he has made a substantial investment in Suzuki. In 1993, Mr. Motorcycle paid $200,000 for the franchise. In 2001, Mr. McIntyre bought a 22,000 square foot building with a 100,000 square foot lot. In 2005, he paid $1.5 million to his brother to purchase his brother's stock. Mr. Motorcycle pays $4,900.00 per month rent to Mr. Tracy McIntyre for rent on the building.

According to Mr. McIntyre, if the dealership lost Suzuki, and with the current economy, he might lose the business. [84] At times, Suzuki has been the No. 1 brand, and it has been the No. 1 dealer. It is still the No. 2 or No. 3 brand, and is an important portion of the service and sales business. [85]

3. ALJ's Analysis

Although Mr. McIntyre claimed that he significantly invested in the Suzuki brand alongside the 19 other brands that Mr. Motorcycle represents, he was elusive about the financial records and profits of the business, claiming that the entire dealership would be put out of business. In the absence of controverting financial records, the evidence supports Suzuki's position that the dealership was ordering, displaying, and selling minimal orders of Suzuki product. Based on the sales data analysis and order history for the past five years, it appears that the loss of the relatively minor Suzuki orders and sales would minimally affect Mr. Motorcycle's financial investment and obligations. Therefore, the ALJ concludes that the dealer's investment and obligations would not be significantly affected by the termination.

C. Injury or Benefit to the Public

1. Arguments and Evidence

***15** The Code requires an analysis concerning any injury or benefit to the public. Suzuki contended that the brothers' infighting rose to the level where the public could have been physically injured. Further, Suzuki argues that the replacement of the Suzuki dealership in El Paso will lessen the potential harm to consumers and will benefit the public by increased competition. Mr. Motorcycle disagrees and maintains that the loss of jobs and goodwill if it went out of business outweighs any harm to the consumer.

Suzuki pointed to an application for a Protective Order filed in El Paso County, Texas on February 9, 2007, by Tracy McIntyre against Michael McIntyre as a potential source of injury to the public. [86] The protective order application alleged that Michael McIntyre trespassed on Mr. Motorcycle's property, disarmed the alarm system and video recording system, and tore off ceiling tiles from an office. It also alleged that Michael McIntyre carried a concealed knife in the dealership, on six occasions from December 2005 until January 2006. In May 2005, Michael McIntyre threatened to shoot Tracy McIntyre in the head if Tracy terminated Michael's wife from the business. The protective order application requested that Michael McIntyre's concealed handgun permit be suspended. Suzuki cites these allegations as proof that the level of violence occurring at the dealership could reasonably endanger the public.

Suzuki also pointed to consumer dissatisfaction with the dealership as further evidence of public harm. Mr. Conroy testified that he received an e-mail from a dissatisfied customer on March 18, 2010, alleging that service was only available for products purchased at Mr. Motorcycle. [87] Other consumers complained that the service department would not comply with a recall campaign. [88] Suzuki argued that Mr. Motorcycle's business practice of not providing superior service is detrimental to the public. Because Mr. Motorcycle failed to aggressively represent Suzuki, the public will benefit from cancellation of the franchise.

Mr. Motorcycle counters that the public has an interest in healthy competition. Because Mr. Motorcycle has a large building with two showrooms and numerous brands besides Suzuki, a consumer can compare brands, prices, service, and warranties. Besides, Mr. Motorcycle has developed a loyal clientele and significant goodwill in El Paso over the past 25 years, as a family-owned and operated small business. Further, if Mr. Motorcycle closed it would result in the loss of over 40 jobs.

Mr. Motorcycle refutes that a few dissatisfied customers outweigh the satisfaction of many thousands of customers. Mr. McIntyre also pointed out that the consumer complaint cited was an angry customer who was complaining that the dealership did not have a black and red 2009 Suzuki C109RT, because it was on back order. [89]

As to the protective order, Mr. McIntyre testified that it was blown out of proportion and just a family feud that did not endanger the public. Besides, after his brother had been paid, it was agreed that his brother would not be openly contentious with the dealership. [90] There have been no further incidents since the parting.

2. ALJ's Analysis

***16** The evidence in support of this factor weighs in favor of establishing good cause for termination. The acts alleged in the protective order show that a business dispute took on dangerous qualities that could have endangered the public, including threats of violence at the dealership. Although the public does benefit from the ability to compare products and every business certainly has dissatisfied customers, the evidence reflects that the infighting escalated to the point that

the public could have been at serious risk from the threats of violence. The public should not be subjected to or exposed to violence and harm while purchasing a vehicle.

Because Suzuki made representations that a new franchise agreement would be entered into with another El Paso dealer, the public will only be temporarily inconvenienced by termination of Mr. Motorcycle's franchise. In the interim, considering the proximity of Santa Teresa, the short drive would not appear to cause the public unnecessary hardship. Further, the evidence demonstrated that there was not much benefit to the public to keep Mr. Motorcycle's Suzuki franchise open, considering the poor sales, reduced inventory, and inadequately trained service personnel.

Therefore, the ALJ concludes that potential benefit to the public from terminating the franchise outweighs the potential injury to the public, providing further good cause for termination of the franchise agreement.

D. The Adequacy of Mr. Motorcycle's Service Facilities, Equipment, Parts and Personnel in Relation to Other Dealers

1. Evidence and Argument

Suzuki argued that Mr. Motorcycle failed to employ an adequate number of qualified service personnel. Mr. Motorcycle maintained that it has qualified and experienced service personnel.

Mr. Conroy testified about the problems Suzuki had with Mr. Motorcycle's service department. [91] Mr. Conroy pointed to the Dealer Agreement, section 3.6, which provides that Mr. Motorcycle must have at least one full-time mechanic who has been to the Suzuki Service School. [92] Suzuki's records proved that Suzuki service technician, Jose Hernandez, did not begin his Suzuki ServicePro Training until April 2, 2009, after the dealership termination letter was sent. Another technician, Juan Portillo, completed his training on April 28, 2009. The other records showed that a "Delivered with Pride Clinic," technical training was given to technicians and the sales force, but the clinic was last attended on December 7, 2005. [93] In essence, Mr. Motorcycle fell below standards in this requirement.

Mr. McIntyre explained that the dealership has eight service employees and a 3,000 square foot service area. Although his brother formerly handled the service department, Mr. McIntyre was sure that the service technicians had taken the training and that Suzuki's records inaccurately reflected the service courses taken. Because there was the discrepancy, he required that the service personnel take the courses again. [94] He also testified that all service personnel have service training, but the training overlapped. [95]

2. ALJ's Analysis

***17** Based on the preponderant evidence, the ALJ finds that Mr. Motorcycle failed to have sufficient trained personnel to comply with the dealer agreement that one employee must have attended the Suzuki service training. Mr. Conroy testified that Suzuki maintains accurate records of the attendees and the courses attended, and the records reflected that no Mr. Motorcycle service personnel attended the training before the termination letter. Mr. McIntyre did not produce a record that any of his employees had the training until after the termination letter. Absent any contrary evidence, the ALJ concludes that the Suzuki records were accurate and reflect that Mr. Motorcycle had inadequate service personnel available to provide Suzuki service. Therefore, Suzuki established that Mr. Motorcycle's service situation did not compare favorably with other dealers

E. Whether Warranties are Being Honored by the Dealer

1. Evidence and Argument

There was relatively little testimony concerning this prong of the analysis. Suzuki contended that the frame recall issue on the 2005 and 2006 GSXR1000 motorcycle illustrated the rancorous relationship between Mr. Motorcycle and Suzuki. According to Mr. Conroy, Mr. McIntyre informed him on February 5, 2009, that Mr. Motorcycle did not have the proficiency to implement the 2005-2006 frame warranty campaign, which included installing a bracket. [96] Mr. Conroy then began receiving customer complaints from customers concerning the refusal to perform the recalls, which were later repaired at Santa Teresa. [97] After the notice of termination was sent, Mr. Motorcycle did perform some frame recall repair. [98]

Mr. McIntyre testified that Mr. Motorcycle is the only dealer in Texas who gets paid retail prices by the manufacturer, rather than wholesale prices. [99] The service and warranty work is a very profitable part of the business and Suzuki has more major recalls than other companies. [100] According to Mr. McIntyre, customers were told that the dealership had to clarify what was required by the recall, but he did not tell customers that recall work could not be done. After he found the answers, he personally called eighty customers about their warranty work. Later he found out that customers who called Suzuki were being sent Santa Teresa. [101]

2. ALJ's Analysis

The ALJ finds that this good-cause termination factor weighs against Mr. Motorcycle. The parties disagree on whether the frame recall warranty work was properly accomplished. Suzuki maintains that customers were turned away with resultant complaints and had to complete their warranty work in New Mexico. Mr. McIntyre maintains that there was a misunderstanding and that he personally called the customers who did have the warranty work completed. The documentary evidence, however, supports that the majority of the frame recall warranty work was done in New Mexico, resulting in customer complaints against Mr. Motorcycle's failure to complete the Suzuki warranty work. Because warranties were not being honored by Mr. Motorcycle, discontinuance of the franchise would not harm the availability and convenience of warranty service work for Suzuki customers.

F. Parties' Compliance with the Franchise Agreement

1. Evidence and Argument

***18** Because other non-compliance controversies have been covered in previous sections, the dissension among Mr. Motorcycle's owners was addressed by both parties in this prong of the analysis.

The dealership agreement provides that Suzuki may terminate the franchise upon 60 days written notice after the occurrence of "dissension among the dealership's owners which in the sole judgment of Suzuki is detrimental to the proper operation of the dealership." [102] Suzuki argues that the in-fighting among the brothers, culminating in a protective order, threats of violence, and dismissed assault charges have interfered with the operation of the dealership and impacted sales.

Mr. Conroy testified that Michael McIntyre ceased working at the dealership in January 2006, which was when sales declined and communication and decision-making issues arose. [103] Mr. Vaughn also related the problems that he had with unanswered phone calls and e-mails about product, sales, allocations, and ordering. [104]

Mr. Motorcycle argued that the business relationship did not impact the dealership operation because other brands had record sales. Mr. McIntyre testified that he had the three best years from 2005-2008. He also testified that the parting between him and his brother after the buy-out has been amicable and that the business was not affected by their disagreements.

Mr. McIntyre argued that any breach of the agreement caused by dissension was cured by the $1.5 million purchase of his brother's stock.

2. ALJ's Analysis

The dissension among the owners permeated Mr. Motorcycle's business operations, resulting in poor communication between the sales representative and management; inadequate recordkeeping of financial documents and service records; a lack of proficiency in warranty service work; decreased sales; and an obvious strain between Suzuki and Mr. Motorcycle that resulted in written communication only. This was about the same time that the sales declined and orders plummeted. Based on the testimony and evidence, the ALJ concludes that the dissension among the owners detrimentally affected the business, and in combination with other non-compliance issues, weigh in favor of termination.

G. The Enforceability of the Franchise Agreement from a Public Policy Standpoint, Including its Reasonableness, Oppression, Adhesion, and the Parties' Relative Bargaining Power

1. Evidence and Argument

Neither party offered any evidence or argument concerning the reasonableness of the franchise agreement, the existence of oppression or adhesion in enforcing the franchise agreement, or any inequity in the parties' relative bargaining power. Instead, the parties acknowledged that the franchise agreement was entered into willingly and appropriately. As to the enforceability of the franchise agreement from a public policy standpoint, however, Suzuki maintained that it has an irretrievably broken relationship with Mr. Motorcycle characterized by mistrust between the Suzuki sales representative and management; reduced sales, orders, and services; and miscommunication between the parties. Mr. Motorcycle argued that it has an ongoing business relationship with Suzuki that should continue unabated.

***19** Because Both Suzuki and Mr. Motorcycle have addressed whether the parties have a “broken relationship” in this prong of the good cause analysis, the ALJ will address this issue. Suzuki pointed to Santa Teresa as the impetus of the bad relationship, while Mr. Motorcycle responded that the economic downturn is the real culprit, that relationships are improved, and that the problems do not warrant termination.

As an example of a public policy reason that enforcement of the franchise agreement should include termination of the agreement for good cause, Mr. Ash Vaughn, the Suzuki district sales manager, relayed the difficulties he had as part of his responsibilities to make sure the product is properly represented on the floor and properly priced. According to Mr. Vaughn, on his third visit to the dealership, a customer asked him a question about whether Suzuki still made a particular motorcycle. He responded by telling the customers to talk to an employee and pointed the customer in the right direction. Mr. McIntyre told Mr. Vaughn to never talk to his customers and to never come back. [105] Mr. Vaughn also testified that he took some pictures to document the Suzuki display on the showroom floor. He was told not to take pictures. On his fourth visit, Mr. McIntyre called the police, but Mr. Vaughn left before they arrived. Mr. McIntyre told him not to return to the dealership or the police would be summoned. He testified that it has been extremely difficult to do business with Mr. Motorcycle. [106]

According to Mr. McIntyre, anytime there is conflict, the police are called as mediators. [107] According to Mr. McIntyre and Mr. Evans, Mr. Vaughn was using profanity. He was at the desk talking to Mr. Vaughn when he got a phone call. Mr. Vaughn began taking pictures, including non-Suzuki product, and talking to a customer about Suzuki versus Honda. When he confronted Mr. Vaughn he began using profanity and Mr. McIntyre called the police. Mr. McIntyre explained that there are trade secrets with product placement and accessorizing and that he had to protect the secrets. Mr. McIntyre testified that he now has a good relationship with the Suzuki sales representative.

2. ALJ's Analysis

Because neither party argued that the franchise agreement was unreasonable or unenforceable; that oppression or adhesion were utilized in its terms; or that any inequity in the parties' relative bargaining power existed, the ALJ finds that the franchise agreement is enforceable from a public policy standpoint. However, Suzuki makes the argument that termination is the only method of enforcement of the agreement, which should be permitted by a public policy standpoint. It is clear from the totality of the evidence, that Suzuki and Mr. Motorcycle have an irretrievably broken relationship characterized by mistrust and hostility between the Suzuki sales representative and Mr. Motorcycle management; reduced efficiency in sales and services; and poor communication. These difficulties have only grown worse over the last six years. Because there are no other avenues to enforce adherence to the agreement, good cause has been demonstrated for termination. Therefore, in considering all the circumstances, the ALJ concludes that the parties' relationship has degraded to the point where business cannot be conducted in a civil manner.

VII. CONCLUSION

***20** Based upon the evidence, Suzuki did not violate Sections 2301.453 and 2301.455 of the Texas Occupation Code by terminating or refusing to continue the franchise of Mr. Motorcycle without good cause. Instead, the evidence established that good cause exists to terminate Mr. Motorcycle's franchise and accordingly, no penalties, sanctions, or other orders are necessary to address the protest. Therefore, the ALJ recommends that the Department deny Mr. Motorcycle's protest and allow Suzuki to terminate the franchise.

VIII. FINDINGS OF FACT

Background/Procedural History

1. American Suzuki Motor Corporation (Suzuki or Respondent) began its affiliation with Mr. Yamaha, Inc. d/b/a Mr. Motorcycle (Petitioner or Mr. Motorcycle) on December 2, 1993, when Tracy and Michael McIntyre, twin brothers, signed a Suzuki Products Dealer Agreement to operate a Suzuki franchise in El Paso, Texas.

2. On the same date, Petitioner and Respondent also entered into a Performance Agreement outlining Suzuki's expectations concerning sign placement, sales, advertising, and showroom space.

3. On April 2, 2009, Suzuki notified Mr. Motorcycle of its decision to terminate the dealer franchise agreement, citing numerous reasons: (1) failure to adhere to warranty and recall obligations; (2) poor sales history; (3) insufficient inventory; (4) failure to employ qualified service and sales personnel; and (5) a history of dissension among the owners.

4. In response to Suzuki's notice of termination, on May 15, 2009, Mr. Motorcycle filed a Notice of Protest of Franchise Termination with the Texas Department of Motor Vehicles (Department).

5. On May 19, 2009, the Department referred the case to SOAH to conduct a hearing on the merits.

6. The referral stated that the Department would not be a party to the proceeding.

7. On May 26, 2009, the Department issued a letter and a notice of hearing to the parties.

8. The Department informed Suzuki that Mr. Motorcycle had filed a formal protest against Suzuki alleging that Suzuki had violated certain provisions of the Texas Occupation Code.

9. In referring this matter to SOAH, the Department identified the following issues to be addressed in the hearing:

a. whether Suzuki violated Sections 2301.453 and 2301.455 of the Texas Occupation Code by terminating or refusing to continue the franchise of Mr. Motorcycle without good cause;

b. whether sanctions and penalties, if any, should be imposed against Suzuki; and

c. whether other orders should be imposed against Suzuki to address the protest.

10. The hearing on the merits convened on June 8-11, 2010, before Administrative Law Judge Penny A. Wilkov. Petitioner was represented by Attorney Jennifer S. Riggs. Respondent was represented by Attorneys Lloyd "Buddy" Ferguson and Merritt Spencer. After the receipt of the transcript and closing arguments and responses, the record closed on December 23, 2010.

11. Relevant terms of the dealer agreement include:
***21** a. *Purpose*. The purpose of the Agreement is to establish a good working relationship between Suzuki and its Dealer. Suzuki expects that Dealer will actively, aggressively and honestly promote the sale of Suzuki products with prompt, efficient, and courteous service used to preserve and promote Suzuki products;

b. *Dealer's Responsibility*. Dealer will use its best efforts to sell Suzuki products at retail;

c. *Ownership and Management*. Tracy McIntyre and Michael McIntyre are named as the sole legal owners with full authority and responsibly for the operation and management;

d. *Dealer's Sales Responsibility*. Dealer agrees that the best method of measuring its market share is by comparison of its sales against the national, state, county and local areas sales percentages in the product categories;

e. *Inventories*. Dealer shall maintain at all times a minimum inventory of Suzuki products for display, demonstration, and sale. A minimum inventory is the quantity and models necessary for a sixty-day supply, based on the current Dealer sales plan but subject to availability;

f. *Service Personnel*. Service personnel must be competent and properly trained to handle all service work of Dealer's customers;

g. *Recall and Safety Procedures*. If the dealer receives from Suzuki any notification of a recall or other safety or product improvement campaign, the Dealer must comply with it; and

h. *Co-operative Advertising Program*. Dealer will participate in Suzuki's cooperative advertising program in accordance with Suzuki's Co-op Policy.

12. Mr. Motorcycle represents numerous other product lines in the motorcycle and All-Terrain Vehicle (ATV) category, including Yamaha, Suzuki, Polaris, Triumph, Houzo, Madami Hyosung, Ducati, Victory, KTM, Kasea, Cagiva, Xtreme, Lifan, Kinli, Daelim, United Motors, Alpha Sports, MV Augusta, Husqvarna, Moto Guzzi, Arctic Cat, and Aprilia.

13. Until 2009, all of Mr. Motorcycle's corporate stock was owned in equal shares by Tracy McIntyre and Michael McIntyre.

14. In 2009, as the result of a dispute and Michael's desire to join the Christian ministry, Tracy McIntyre bought the entire company for $1.5 million.

15. In 2005, Suzuki signed a similar dealer agreement with a competing Suzuki motorcycle dealership, Santa Teresa Motorsports (Santa Teresa), located in Sunland Park, New Mexico, approximately 13 miles from Mr. Motorcycle, and 100 yards outside of the El Paso, Texas, county line.

Mr. Motorcycle's Sales in Relation to Sales in the Market

16. In order to determine Suzuki's sales relative to the market, Suzuki relied on data from two sources: the Motorcycle Industry Council (MIC) dealer database and the MIC warranty registration database.

17. Because the parties relied on the MIC data throughout their relationship and there was no evidence that R. L. Polk collected motorcycle data, the MIC data was proper to measure Mr. Motorcycle's sales in relation to sales in the market rather than R.L. Polk.

***22** 18. The Suzuki dealerships in the Greater El Paso area are:
a. Mr. Motorcycle;

b. Las Cruces Motorsports located in Las Cruces, New Mexico (NM), established in 1997, and situated 40.3 miles from Mr. Motorcycle, with major product lines of Honda, Kawasaki, and Suzuki;

c. Santa Teresa, which shares a common owner with Las Cruces Motorsports, with major product lines of Suzuki and Polaris; and

d. Southwest Suzuki located in Alamogordo, NM, established in 1996, and situated 90 minutes north of Mr. Motorcycle, with a major product line of Suzuki.

19. The MIC data reflected the following sales statistics:

Regional Dealer Sales of Suzuki Motorcycles and ATVs (2004-2008)

Dealership	2004	2005	2006	2007	2008
Mr. Motorcycle	290	244	149	133	70
Southwest Suzuki	136	139	134	123	94
Las Cruces Motorsports	262	244	237	201	202
Santa Teresa Motorsports	NA	53	316	310	264

20. Based on the MIC data analysis, the following conclusions were established:
a. From 2004 until 2008, Mr. Motorcycle's sales steeply declined from 290 motorcycles and ATVs (units) sold in 2004 to 70 units sold in 2008;

b. Las Cruces Motorsports showed a relatively steady sales level from 262 units sold in 2004 to 202 units sold in 2008;

c. Mr. Motorcycle's ATVs sales have dropped from 74 sold in 2004, 12 sold in 2007, and three sold in 2008;

d. Santa Teresa showed a dramatic increase in sales from 52 units sold at the inception of business in 2005 to 264 units sold in 2008; and

e. Southwest Suzuki showed steady sales from 136 units sold in 2004 to 94 units sold in 2008.

21. Increasingly from 2005-2009, Santa Teresa has been selling more vehicles in Greater El Paso, even though it is locationally disadvantaged by 13 additional miles to travel.

22. Despite the advantage of being in business for many years, increased signage, and community presence, potential Mr. Motorcycle customers are driving the extra distance to New Mexico to make the sale.

23. Mr. Motorcycle's facilities are very favorably located, at the confluence of several major routes and located in a demographic where people are purchasing the motorcycles.

***23** 24. Although Mr. Motorcycle has a geographically advantageous position due to its convenient location, customers are traveling greater distances for sales.

25. Mr. Motorcycle's sales have dropped precipitously compared to sales in the market from 2005-2009: Mr. Motorcycle's sales have dropped 76%; Southwest Suzuki's have declined by 31%; Las Cruces' sales have dipped 23%; and Santa Teresa's sales have fallen 16%.

26. Although all ten of the most populous Texas counties had declining Suzuki sales, El Paso County has experienced one of the largest declines:

Suzuki Market Share Trends Relative to the Largest ATV/ MC Counties by Percentage (Based on Warranty Registrations)

County	2004	2005	2006	2007	2008	2-year trend (2006-2008)	4-year trend (2004-2008)
Bexar	10.2%	13.7%	13.4%	12.6%	11.3%	-2.1%	1.1%
Dallas	12.9%	11.7%	13.4%	12.2%	10.4%	-3.0%	-2.5%
El Paso	14.3%	14.2%	14.9%	11.8%	9.3%	-5.5%	-5.0%
Harris	11.5%	12.8%	13.7%	12.7%	12.5%	-1.2%	1.0%
Travis	8.7%	9.7%	14.4%	9.9%	13.1%	-1.4%	4.4%

27. In ranking 24 Texas and New Mexico counties with 2008 sales volumes totaling at least 1,000 ATV and motorcycle registrations, El Paso County has fallen from the fourth ranking out of the 24 counties in total market share in 2004 to the thirteenth ranking out of the 24 counties in 2008.

28. Honda and Yamaha have benefited from Suzuki's declining market share, significantly increasing their sales. Specifically, Honda has increased its market share in El Paso from 22.0% in 2004 to 29.0% in 2008, while Yamaha has increased its market share in El Paso from 17.0% in 2004 to 19.0% in 2008.

***24** 29. In 2007, Mr. Motorcycle was named "ATV Dealer of the Year" by Arctic Cat brand.

30. Mr. Motorcycle failed to maintain the minimum inventory required by the dealer agreement, which required Mr. Motorcycle to maintain the quantity of models necessary for a 60-day supply.

31. Mr. Motorcycle regularly carried less than one month of ATV supply available.

32. Product display is critical in a multi-line dealership because it allows a side-by-side comparison and especially with ATVs, which account for almost half of Suzuki's national sales.

33. The following inventory noncompliance incidents occurred during the Suzuki regional manager's visits made to the dealership: (1) only two Suzuki ATVs out of 55 other ATV brands were on display; (2) one to three ATVs were on display, although equal representation with other lines would have been 10-12 ATVs; and (3) only one Suzuki ATV out of 59 other ATV brands were on display.

34. Mr. Motorcycle failed to adhere to the sales responsibility provision in the performance agreement to maintain quarterly retail sales equal to the percentage of Suzuki products sold nationally.

35. Mr. Motorcycle frequently failed to adhere to sales and allocation rules by curtailing allocations, by substituting handwritten terms and conditions on the pre-printed order forms, and by rejecting already-shipped orders at the dealership, at great expense to Suzuki.

36. After Santa Teresa was established, Mr. Motorcycle began to reduce its product orders.

37. Shortly after Santa Teresa opened, Mr. Motorcycle ordered two ATVs and 45 motorcycles during the June 2005 allocation period, the only opportunity to order 2006 products, although 66 ATVs and 206 motorcycles had been ordered the previous year.

38. On October 7, 2005, Suzuki advised Mr. Motorcycle that the sales requirement was violated because Suzuki's records showed only four ATVs in inventory.

39. On January 18, 2006, the Suzuki regional manager visited the dealership and confirmed that there was only one Suzuki ATV on the floor out of 60 ATVs displayed.

40. Another letter from Suzuki in June 2006, cited a breach of the minimum annual sales volume provision and pointed out that sales had had declined 20% over three years while El Paso population increased 4% over the same period; that Suzuki ATV sales have increased regionally and nationally; and that the El Paso market penetration declined from 58% in December 2004 to 49% in December 2005.

41. In 2008, Mr. Motorcycle began substituting and changing terms and conditions on the order forms, although none of the other 330 Suzuki dealers modified the order forms. Suzuki rejected the changes and as a result, no product was shipped.

42. By 2008, the only communication between the parties was by certified mail. No telephone contact was occurring.

43. Suzuki began requiring Mr. Motorcycle to put all orders in writing as the result of cancelled orders where a loaded truck would be refused at the dealership. Suzuki would then have to ship the product to a warehouse for storage or to another dealer willing to accept the shipment.

***25** 44. Although Mr. Motorcycle cited the lack of competitiveness with other brands as a reason for declining Suzuki sales, other dealerships throughout the country were able to maintain sales comparable to sales of Honda and Yamaha.

45. The growing mistrust and communication difficulties between the parties had a negative impact on Mr. Motorcycle's sales in relation to sales in the market.

46. Texas consumers buying products in New Mexico were required to pay use taxes when their vehicles were titled in Texas, comparable to Texas sales tax. Any sales tax advantage enjoyed by Santa Teresa would not have affected Mr. Motorcycle's display, inventory, or sales, especially since a use tax would be due in Texas.

47. Mr. Motorcycle's sales in relation to sales in the market were inadequate.

Mr. Motorcycle's Investment and Obligations

48. Mr. McIntyre was not able to provide year-end reports, financial statements, and financial summaries because the financial accounting system is outdated and does not break down the information by brands.

49. Because invoices are kept chronologically and not by brand, Mr. McIntyre did not have knowledge of the dealership's profit or accounting method.

50. Without financial statements, the dealer's investment and obligations could not be ascertained.

51. Mr. Motorcycle sells 20 different brands and the elimination of Suzuki sales and products will not adversely affect Mr. Motorcycle's investment or obligations.

52. Based on the previous five years of Suzuki minimal sales and orders, the loss of the Suzuki franchise will not significantly affect Mr. Motorcycle's financial investment and obligations.

Injury or Benefit to the Public

53. An application for a Protective Order was filed in El Paso County, Texas on February 9, 2007, by Tracy McIntyre against Michael McIntyre.

54. The protective order application contained a signed and sworn statement by Tracy McIntyre that Michael McIntyre had trespassed on Mr. Motorcycle's property; disarmed the alarm system and video recording system; tore off ceiling tiles from an office. The application alleged that Michael McIntyre carried a concealed knife in the dealership on six occasions, from December 2005 until January 2006. In May 2005, Michael McIntyre threatened to shoot Tracy McIntyre in the head at the dealership.

55. The acts alleged in the protective order show that the business dispute took on dangerous qualities that could have endangered the public, including threats of violence at the dealership.

56. The public should not be subjected to or exposed to violence and harm while purchasing a motorcycle or ATV.

57. Although the public does benefit from the ability to compare products and every business certainly has dissatisfied customers, the infighting between the owners had escalated to the point that the public could have been at serious risk from the threats of violence.

58. Because Suzuki made representations that a new franchise agreement would be entered into with another El Paso dealer, the public will only be temporarily inconvenienced by termination of Mr. Motorcycle's Suzuki franchise.

***26** 59. In the interim, considering the proximity of Santa Teresa, the short drive would not cause the public unnecessary hardship.

60. There is little benefit to the public to keep Mr. Motorcycle's Suzuki franchise open, considering the poor sales, reduced inventory, and inadequately trained service personnel.

61. The potential for injury to the public outweighs any benefit from continuing the franchise agreement.

The Adequacy of Mr. Motorcycle's Service Facilities, Equipment, Parts and Personnel in Relation to Other Dealers

62. The Dealer Agreement, section 3.6, provides that Mr. Motorcycle must have at least one fulltime mechanic who has been to Suzuki Service School.

63. Suzuki's records showed that Mr. Motorcycle's Suzuki service technician, Jose Hernandez, did not begin his Suzuki ServicePro Training until April 2, 2009, after the dealership termination letter was sent by Suzuki to Mr. Motorcycle.

64. Another Suzuki service technician, Juan Portillo, completed his training on April 28, 2009.

65. The other records showed that a "Delivered with Pride Clinic," technical training was given to technicians and the sales force, but the clinic was last attended on December 7, 2005.

66. Mr. Motorcycle failed to have sufficient trained personnel to comply with the dealer agreement that one employee must have attended the Suzuki service training.

67. Suzuki maintains accurate records of the attendees and the courses attended.

68. No records were produced that any of Mr. Motorcycle's employees had the training before the termination letter was sent by Suzuki to Mr. Motorcycle.

69. Mr. Motorcycle had inadequate service personnel available to provide Suzuki service and therefore, Mr. Motorcycle's service situation did not compare favorably with other dealers.

Whether Warranties are being Honored by the Dealer

70. On February 5, 2009, Mr. McIntyre informed the Suzuki regional manager that Mr. Motorcycle did not have the proficiency to implement the 2005-2006 model frame warranty campaign, which included installing the bracket.

71. Suzuki then began receiving customer complaints concerning the refusal to perform the recalls at Mr. Motorcycle.

72. Customers were turned away from Mr. Motorcycle and had to have the recall work performed at Santa Teresa.

73. After the notice of termination was sent, Mr. Motorcycle did perform some frame repair recall warranty work.

74. The Dealer Agreement, section 3.13, provides that Mr. Motorcycle must comply with any notification of procedures concerning a recall.

75. The failure or refusal to comply with the procedures is a violation of the agreement.

76. Because warranties were not being honored by Mr. Motorcycle, discontinuance of the franchise would not harm warranty service work and convenience for Suzuki customers.

Parties' Compliance with the Franchise Agreement

77. The dealership agreement provides that Suzuki may terminate the franchise upon 60 days written notice after the occurrence of dissension among the dealership's owners which in the sole judgment of Suzuki is detrimental to the proper operation of the dealership.

***27** 78. The in-fighting among the brothers, culminating in a protective order, threats of violence, and dismissed assault charges have detrimentally interfered with the operation of the dealership and impacted sales.

79. Michael McIntyre ceased working at the dealership in January 2006, which was when sales declined and communication and decision-making issues arose.

80. Suzuki began experiencing unanswered phone calls and e-mails with Mr. Motorcycle about product, sales, allocations, and ordering.

81. The dissension among the owners permeated the business operations, resulting in poor communication between the sales representative and management; inadequate recordkeeping of financial documents and service records; a lack of proficiency in warranty service work; decreased sales; and an obvious strain between Suzuki and Mr. Motorcycle that resulted in written communication only.

82. The dissension among the owners detrimentally affected the business, and in combination with other non-compliance issues, demonstrates a pattern of non-compliance with the franchise agreement.

The Enforceability of the Franchise Agreement from a Public Policy Standpoint, Including its Reasonableness, Oppression, Adhesion, and the Parties' Relative Bargaining Power

83. It was not demonstrated that the franchise agreement was unreasonable or unenforceable, that oppression or adhesion existed between the parties in entering into or enforcing the franchise agreement, or that any inequity in the parties' relative bargaining power was present. Instead, both parties were savvy and independent business partners who entered into the franchise agreement willingly and appropriately.

84. Termination of the franchise agreement is the only remaining method of enforcement of the agreement, which should be permitted by a public policy standpoint.

85. Suzuki and Mr. Motorcycle have an irretrievably broken relationship characterized by mistrust and hostility between the Suzuki sales representative and Mr. Motorcycle management; reduced efficiency in sales and services; and poor communication. These difficulties have only grown worse over the last six years.

86. As an example of the broken relationship that exists between the parties, the Suzuki district manager was not permitted to visit the premises by Mr. McIntyre or the police would be summoned.

87. The Suzuki district sales manager had the responsibility to make sure the Suzuki product was properly represented and on the floor and properly priced.

IX. CONCLUSIONS OF LAW

1. The Department of Motor Vehicles (Department) has exclusive jurisdiction in this matter. TEX. OCC. CODE §§ 2301.005 and 2301.151.

2. The State Office of Administrative Hearings has authority to conduct a contested case hearing and issue a proposal for decision in this matter. TEX. OCC. CODE § 2301.704.

3. The termination of a motor vehicle franchise agreement is governed by statute. TEX. OCC. CODE § 2301.001 *et seq.*

***28** 4. A manufacturer may terminate an existing franchise under only three circumstances: (1) the dealer gives informed consent to terminate; (2) the appropriate time for a dealer to file a protest has elapsed; or (3) the Motor Vehicle Board (Board) of the Department has made a determination of good cause. TEX. OCC. CODE § 2301.453(a).

5. A manufacturer who intends to terminate a franchise must provide written notice by registered or certified mail to the dealer and the Board stating the specific grounds. TEX. OCC. CODE § 2301.453(c)(1) and (2).

6. The notice must be received not later than the 60th day before the termination and must notify the dealer of the right to file a protest and have a hearing. TEX. OCC. CODE § 2301.455(a).

7. A franchised dealer may file a protest with the Board not later than the 60th day after the date of the receipt of the notice of termination. TEX. OCC. CODE § 2301.453(e).

8. The Board then notifies the party seeking the termination that a protest has been filed and a hearing is required TEX. OCC. CODE § 2301.453(f).

9. Pursuant to TEX. OCC. CODE § 2301.455(a), good cause for termination of the franchise is established by the following factors:
a. the dealer's sales in relation to sales in the market;

b. the dealer's investment and obligations;

c. any injury or benefit to the public;

d. the adequacy of the dealer's service facilities, equipment, parts and personnel in relation to those of other dealers of new motor vehicle of the same line-make;

e. whether warranties are being honored by the dealer;

f. the parties' compliance with the franchise agreement, except to the extent that the franchise conflicts with the law; and

g. the enforceability of the franchise agreement from a public policy standpoint, including issues of the reasonableness of the franchise's terms, oppression, adhesion, and the parties' relative bargaining power.

10. Based on the above Findings of Fact and Conclusions of Law, Suzuki did not violate TEX. OCC. CODE §§ 2301.453 and 2301.455, by terminating or refusing to continue the franchise of Mr. Motorcycle without good cause.

11. The Department has the authority to impose a civil penalty of $10,000 per violation per day, after considering the seriousness of the violation, economic damage caused by the violation, and other factors. TEX. OCC. CODE § 2301.801.

12. Based upon the above Findings of Fact and Conclusions of Law, no penalties, sanctions, or other orders are necessary to address the protest.

13. Based upon above Findings of Fact and Conclusions of Law, the Department should deny Mr. Motorcycle's protest and allow Suzuki to terminate the franchise.

Penny A. Wilkov
Administrative Law Judge

Footnotes

1 In various orders, closing arguments or responses were due or extended until July 30, September 17, October 1, December 3, and December 23, 2010.
2 TEX. OCC. CODE (Code) § 2301.001.
3 *Id.*
4 Code § 2301.002(15).
5 Code § 2301.453(a).
6 Code § 2301.453(c) (1) and (2).
7 Code § 2301.455(a).
8 Code § 2301.453(e).
9 Code § 2301.453(f).
10 Code § 2301.455(a).
11 Code § 2301.453(c).
12 Code § 2301.453(f).
13 Code § 2301.453(g).
14 Code § 2301.801.
15 Ex. R-3, pps. 1-2, 5, 7-8, and 11.
16 Ex. R-4.
17 Tr. at 537.
18 Section 2301.652 grants standing to a protesting dealership if a competing dealership with the same line-make is proposed to be established within a 15-mile radius or in the same county as the protesting dealership. In an application denial hearing, the proposed dealership must then show good cause for establishing a competing dealership.
19 Tr. at 329.
20 Tr. at 275-276.
21 Mr. Daniel's report included the major product lines but there may be other products not listed.
22 Tr. at 45-46; Ex. R-2, p. 7.
23 Ex. R-2, p. 56.
24 Tr. at 54-56; Ex. R-2, p. 15.
25 Tr. at 60-62.
26 Ex. R-2, p. 31.
27 Tr. at 59-60.
28 Tr. at 60-62.

29 EX. R-2, p. 32.
30 Ex. R-2, p. 43. The other five counties are Bernalillo, Collin, Denton, Montgomery, and Tarrant.
31 Ex. R-2, p. 48.
32 Ex. R-2, p. 47.
33 Ex. R-2, p. 43.
34 *Id.*
35 Tr. at 101-104.
36 Tr. at 191-192 and 275-276; Ex. R-3.
37 Tr. at 275-276.
38 Tr. at 204.
39 Tr. at 321.
40 Tr. at 610-612 and 645-647.
41 Ex. R-4; Tr. at 327-328.
42 Ex. R-3.
43 Tr. at 206-207.
44 Tr. at 207-210.
45 Tr. at 263.
46 Tr. at 263-264.
47 Ex. R-26.
48 Ex. R-27.
49 Ex. R-30.
50 Tr. at 287.
51 Ex. R-31.
52 Ex. R-57.
53 Tr. at 407.
54 Tr. at 306-308.
55 Tr. at 248.
56 Ex. R-11.
57 Tr. at 606-607.
58 Tr. at 615.
59 Exs. R-13, R-28, R-33, R-44, and R-28.
60 Tr. at 633-635.
61 Tr. at 634.
62 Tr. at 626-627.
63 Tr. at 606-607.
64 Tr. at 621.
65 Tr. at 606-607.
66 Tr. at 136-138.
67 Tr. at 636-637.
68 Tr. at 575.
69 Tr. at 576.
70 Tr. at 580.
71 Tr. at 576-577.
72 Tr. at 584-586.
73 Tr. at 257.
74 Tr. at 259.
75 Tr. at 250-253.
76 Ex. R-22.

77 34 TEX. ADMIN. CODE (TAC) § 3.346 provides that a use tax is imposed on out-of-state purchases if the items are purchased for use in Texas. The basis of the tax is the purchase price of the item.
78 Tr. at 844-845.
79 *Id.*
80 Ex. R-93.
81 Tr. at 773-775.
82 Tr. at 740, 787.
83 Ex. R-2; Tr. at 32.
84 Tr. at 542.
85 Tr. at 525-526.
86 Ex. R-151, Tr. at 693-694.
87 Tr. at 674-676.
88 Exs. R-121 and R-81.
89 Ex. R-121.
90 Tr. at 712-714.
91 Tr. at 331-333.
92 Ex. R-57.
93 Tr. at 301-303.
94 Tr. at 552-553.
95 Tr. at 550.
96 Ex. R-115.
97 Ex. R-57.
98 Tr. at 335-336.
99 Tr. at 554.
100 Tr. at 590-591.
101 Tr. at 562.
102 Ex. R-115.
103 Tr. at 219-220.
104 Ex. R-3, p. 13.
105 Tr. at 483-486.
106 Ex. R-3, page 13.
107 Tr. at 617-620.

2011 WL 577104 (TX.St.Off.Admin.Hgs.)

End of Document

TAB B

49 S.W.3d 492
Court of Appeals of Texas,
Austin.

LONE STAR R.V. SALES, INC., Appellant,
v.
MOTOR VEHICLE BOARD OF THE TEXAS DEPARTMENT OF TRANSPORTATION & Winnebago Industries, Inc., Appellees.

No. 03–00–00764–CV.
|
May 31, 2001.

Motor home dealer sought judicial review of order of Motor Vehicle Board finding good cause to terminate dealer franchise agreement between dealer and motor home manufacturer. The District Court, Travis County, Lora J. Livingston, J., affirmed the Board's order. Dealer appealed. The Court of Appeals, Patterson, J., held that: (1) Board did not engage in unlawful procedure when it considered manufacturer's untimely filed exceptions to findings of ALJ, and (2) evidence in the record supported finding that dealer issued threat of violence against manufacturer's employee and manufacturer was concerned for safety of its employees who called on dealer.

Affirmed.

West Headnotes (9)

[1] Antitrust and Trade Regulation
Proceedings;hearing

Motor Vehicle Board did not engage in unlawful procedure by considering motor home manufacturer's untimely exceptions to proposed findings of ALJ in termination of franchise agreement protest proceeding with motor home dealer, where manufacturer's exceptions were received late by Board due to postal service error, manufacturer submitted duplicate exceptions promptly upon notification from Board that they had not received exceptions, and dealer did not file response to exceptions, did not ask for continuance, and acquiesced to Board decision to proceed on the merits. V.T.C.A., Government Code § 2001.174(2)(C); Tex.Admin. Code title 16, §§ 101.13, 101.60.

Cases that cite this headnote

[2] Antitrust and Trade Regulation
Proceedings;hearing

Motor home dealer, who was protesting motor home manufacturer's attempt to terminate franchise agreement before Motor Vehicle Board, waived objection to Board's consideration of manufacturer's untimely filed exceptions to proposed findings of ALJ in considering whether manufacturer had shown good cause for termination, where dealer did not file a response to manufacturer's exceptions and did not respond to manufacturer's motion for Board to consider exceptions, and, at two hearings, dealer did not object to proceeding on the merits including manufacturer's exceptions or otherwise request a continuance. Vernon's Ann.Texas Civ.St. art. 4413(36), § 3.08(g) (Repealed); Tex.Admin. Code title 16, §§ 101.60, 101.63.

Cases that cite this headnote

[3] Antitrust and Trade Regulation
Proceedings;hearing

Motor home dealer's substantial rights in motor home franchise that manufacturer was trying to terminate, were not prejudiced by Motor Vehicle Board's alleged unlawful procedure in considering motor home manufacturer's exceptions to proposed findings of ALJ in protest proceeding, even though exceptions were received by Board after the time permitted by rule; dealer did not point to single argument that it was not permitted to fully make either in exceptions or in argument before Board. V.T.C.A., Government Code § 2001.174(2); Tex.Admin. Code title 16, § 101.60.

1 Cases that cite this headnote

[4] **Antitrust and Trade Regulation**
Weight and sufficiency

Evidence in the record of hearing of protest by motor home dealer regarding motor home manufacturer's termination of dealer's franchise agreement supported Motor Vehicle Board's finding that dealer issued threat of violence against manufacturer's employee and manufacturer was concerned for safety of its employees who called on dealer, even though dealer contended that threat was mere hyperbole; two employees of manufacturer testified to incident, and a dealer contact report described the incident.

Cases that cite this headnote

[5] **Administrative Law and Procedure**
Conflicting evidence

When the evidence in an administrative hearing is contradictory, the Court of Appeals resolves any conflict in favor of the agency's decision.

Cases that cite this headnote

[6] **Administrative Law and Procedure**
Substantial evidence

In determining whether agency's finding of fact is reasonably supported by substantial evidence, reviewing court must test the disputed finding against evidence in the record to determine whether such relevant evidence exists as a reasonable mind might accept as adequate to support a finding of fact. V.T.C.A., Government Code § 2001.174(2)(E).

1 Cases that cite this headnote

[7] **Antitrust and Trade Regulation**
Judicial review

Comments made by Motor Vehicle Board members regarding "taking threats in the workplace seriously," during hearing of motor home dealer's protest of motor home manufacturer's termination of franchise agreement, were immaterial to appellate court's review of whether finding that dealer issued threat of violence to manufacturer and manufacturer was concerned for safety of its employees was supported by substantial evidence; evidence supported challenged finding, and comments showed Board's struggle in apportioning blame and assessing responsibility for deteriorating franchise relationship. V.T.C.A., Government Code § 2001.174(2)(E).

Cases that cite this headnote

[8] **Antitrust and Trade Regulation**
Judicial review

Motor home dealer waived complaint that Motor Vehicle Board reversed ALJ's proposed decision in dealer's protest over motor home manufacturer's termination of franchise agreement, where dealer failed to include complaint in motion for rehearing made to Board and did not present complaint to trial court. V.T.C.A., Government Code § 2001.145; Rules App.Proc., Rule 33.1.

1 Cases that cite this headnote

[9] **Administrative Law and Procedure**
Rehearing

A motion for rehearing must be sufficiently definite to apprise the administrative agency of the error claimed and to allow the agency the opportunity to correct the error or to prepare to defend it. V.T.C.A., Government Code § 2001.145; Rules App.Proc., Rule 33.1.

1 Cases that cite this headnote

Attorneys and Law Firms

***493** David R. Sapp, Sapp, Sapp & White, P.C., Austin, for Appellant.

Nancy E. Olinger, Assistant Attorney General, Austin, for Appellee, Motor Vehicle Bd. of the TxDOT.

J. Woodfin Jones, Austin, Christopher J. Lowman, Scott, Douglass & McConnico, L.L.P., Houston, for Appellee, Winnebago Industries, Inc.

***494** Before Chief Justice ABOUSSIE, Justices YEAKEL and PATTERSON.

Opinion

PATTERSON, Justice.

Lone Star R.V. Sales, Inc. ("Lone Star") appeals [1] from a district court judgment affirming an order of the Texas Motor Vehicle Board ("Board") that found good cause existed to terminate the dealer franchise agreement [2] between Lone Star and Winnebago Industries, Inc. ("Winnebago"). [3] The order rejected a proposal for decision issued by an administrative law judge following a contested case hearing involving Lone Star and Winnebago and adopted new findings of fact and conclusions of law. In five issues, Lone Star challenges (i) the Board's consideration of untimely exceptions to the proposal for decision filed by Winnebago, (ii) the Board's decision to allow termination of Lone Star's franchise based on "threats of violence" supported by evidence not in the record, and (iii) the action of the Board in reversing the proposal for decision prepared by the administrative law judge. We affirm the district court judgment.

BACKGROUND

Lone Star owns and operates a motor home dealership in Houston, Texas. Winnebago is a manufacturer of recreational vehicles, and Lone Star is a franchised Winnebago dealer. The dealership is owned by Bruce Byrne who, along with his sons, Scott and Gordon Byrne, opened Lone Star in 1985. In 1994, the Winnebago dealer in Harris County closed its dealership. Winnebago negotiated with Lone Star to become the replacement dealer. The parties signed the first franchise agreement in November 1994 and have renewed their agreement each year.

Due to ongoing disputes on various subjects, from 1996 through 1998 the business relationship between Winnebago and Lone Star soured. On August 28, 1998, Winnebago notified Lone Star of its intent to terminate the dealer franchise agreement, citing the following reasons: (1) failure to honor warranty obligations, (2) poor sales history, (3) disparagement of Winnebago's products, (4) lack of commitment to Winnebago's products, and (5) a history of verbal abuse and threats made by Lone Star personnel against Winnebago employees.

In response to Winnebago's notice of termination, Lone Star filed a Notice of Protest of Franchise Termination with the Board, invoking its statutory right to protest the termination. *See* Tex.Rev.Civ. Stat. Ann. art. 4413(36), § 5.02(b)(3) (West Supp.2001). [4] The contested case was tried before an administrative law judge on February 16 and 17, 1999. On September 13, the administrative law judge issued a proposal for decision, finding that good cause had not been shown for the termination of Lone Star's franchise agreement and recommending that the protest be granted.

The proposal for decision was scheduled to be considered by the Board at its meeting on November 4, 1999. Because Winnebago's ***495** exceptions to the proposal were not timely filed with the Board, Lone Star did not respond to the exceptions prior to the meeting. Winnebago filed a motion asking the Board to consider its late-filed exceptions or, in the alternative, for a continuance of the hearing. At the meeting, after deciding to proceed with the hearing, the Board entertained argument of counsel on whether the proposal for decision should be adopted. After a lengthy hearing, the Board decided to table the matter until its February meeting, directing its staff to prepare an alternative set of findings and conclusions "that would support termination of the franchise."

At the Board's February meeting, the administrative law judge presented three proposed orders finding good cause for termination, one of which was adopted by the Board. Lone Star then filed this lawsuit, seeking judicial review of the Board's order. Tex. Gov't Code Ann. § 2001.171 (West 2000). A Travis County district court affirmed the Board's order. Lone Star appeals the district court judgment.

DISCUSSION

I. Termination of Franchise Agreement

Manufacturers are prohibited from terminating a dealer's franchise unless certain conditions are met. Tex.Rev.Civ. Stat. Ann. art. 4413(36), § 5.02(b)(3)(A). A manufacturer seeking to terminate a franchise must provide the dealer

with written notice not less than sixty days before the effective date of termination setting forth the specific grounds for termination and informing the dealer that he may be entitled to file a protest with the Board. *Id.* § 5.02(b)(3)(A)(i)-(iii). If the dealer files a timely protest, the Board must hold a contested case hearing to determine whether the manufacturer has established by a preponderance of the evidence that there is good cause for the proposed termination. *Id.* § 5.02(b)(3)(A)(iv). In determining whether good cause has been established, the Board must consider "all the existing circumstances," including:

(A) the dealer's sales in relation to sales in the market;

(B) the dealer's investment and obligations;

(C) any injury or benefit to the public;

(D) the adequacy of the dealer's service facilities, equipment, parts and personnel;

(E) whether warranties are being honored by the dealer;

(F) the parties' compliance with the franchise agreement; and

(G) the enforceability of the franchise agreement from a public policy standpoint.

Id. § 5.02(b)(5). The Act is enforced by the Board "to provide for compliance with manufacturer's warranties, and to prevent frauds, unfair practices, discriminations, impositions, and other abuses of our citizens." *Id.* § 1.02.

Winnebago sought termination of Lone Star's franchise, alleging that Lone Star's history of verbal abuse and threats, its disparagement of and lack of commitment to Winnebago products, and its failure to achieve sales objectives and to honor warranty obligations had harmed consumers in the Houston area. Finding both parties to blame for the deteriorating relationship, the administrative law judge concluded that Winnebago failed to establish by a preponderance of credible evidence that good cause existed for the termination of the agreement. She recommended that the Board grant Lone Star's protest and enter a cease and desist order against Winnebago, prohibiting it from terminating the franchise agreement.

***496** In rejecting the proposal for decision, the Board considered "all the existing circumstances," and concluded that Winnebago had established by a preponderance of the credible evidence that good cause existed for the termination of the agreement. *Id.* § 5.02(b)(5). The Board then determined that the protest would be dismissed and that no further action would be taken to prevent the termination of the franchise agreement.

II. Lone Star's Challenges to the Board's Decision

A dealer whose franchise has been terminated by a final order of the Board is entitled to judicial review of the order in a Travis County district court. *Id.* § 7.01(a). The district court reviews final actions of the Board under the substantial evidence rule. *Id.* Under the substantial evidence rule, a reviewing court may not substitute its judgment for the judgment of the agency on the weight of the evidence on questions committed to agency discretion. Tex. Gov't Code Ann. § 2001.174 (West 2000). A reviewing court must reverse or remand the case for further proceedings if the complaining party's substantial rights have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:

(A) in violation of a constitutional or statutory provision;

(B) in excess of the agency's statutory authority;

(C) made through unlawful procedure;

(D) affected by other error of law;

(E) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or

(F) arbitrary or capricious or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion.

Id. § 2001.174(2)(A)-(F).

A. Board's Decision to Consider Winnebago's Untimely Exceptions

In its first three issues, Lone Star complains that, by considering Winnebago's untimely exceptions, the Board engaged in an unlawful procedure, prejudicing Lone Star's substantial rights. *See id.* § 2001.174(2)(C). Lone Star urges that the Board's action was unlawful and constituted

an abuse of discretion. *See id.* § 2001.174(2)(C), (D), (F). Because the record reflects that the Board acted lawfully and within its discretionary authority, we reject Lone Star's challenge.

The facts concerning Winnebago's exceptions are undisputed. The administrative law judge served a copy of the proposal for decision on the parties on September 13, 1999, and notified them that the proposal was set for consideration by the Board at its scheduled meeting on November 4. On October 7, the due date for exceptions to be served, [5] Winnebago mailed its exceptions to the Motor Vehicle Division ("Division") and to Lone Star's counsel. Although Lone Star received a copy of the exceptions on October 12, the Division did not receive these exceptions until October 27 due to an apparent postal error. [6]

***497** Meanwhile, on October 19, an agency employee telephoned Winnebago's counsel regarding another filing. For the first time, counsel for Winnebago learned that the Division had not received its mailed exceptions. In response to the call, counsel forwarded a second set of exceptions to the Division. The Division received the exceptions on October 20. The following day, Brett Bray, the Division Director, acknowledged the untimely receipt of Winnebago's exceptions. By facsimile, he advised: "We will mail your submission and Protestant's response to the Board members. However, we are informing the Board your submission is untimely and should not be considered." By a letter hand-delivered to Director Bray on the same day, Lone Star's counsel complained that he did not have an adequate opportunity to respond and urged that the untimely exceptions not be considered by the Board. [7]

In an October 21 memorandum to the Board enclosing the untimely exceptions, Director Bray wrote: "In keeping with our policy of ensuring that you receive all materials submitted, we are forwarding Winnebago's Exceptions to the Proposal for Decision and the response thereto from Protestant. However, you are not required to read or consider this material in making your decision on November 4."

On October 22, Winnebago filed a motion asking that the Board consider the exceptions or, in the alternative, grant a continuance of the hearing scheduled for November 4. The motion for continuance contained an offer to pay Lone Star's reasonable costs resulting from a continuance. Lone Star did not respond to the motion. On October 29, with notice to the parties, Bray forwarded Winnebago's motion to the Board, recommending two options: that the Board consider the matter on its merits at the upcoming hearing or grant the motion for continuance until the February Board meeting.

At the outset of the November hearing, Board Chairman Bob Barnes carefully delineated the two options available to the Board:

> [O]ne option on this case is to continue it, move it forward to the next meeting. Another one is to go ahead and hear it on this one. It's kind of my feeling that we ought to go ahead and hear the case this time, and I wanted to see what the feeling on the Board was on that. Anybody have an objection to that or any comment?

In the absence of a response, Chairman Barnes proceeded to a hearing on the merits by calling on counsel for Winnebago and for Lone Star. Neither counsel requested a continuance or objected to proceeding on the merits. Both counsel presented oral argument, summarizing arguments delivered in writing in their respective exceptions to the proposal for decision.

At the conclusion of the arguments and a lengthy discussion among the Board members, the Board voted to table the matter until the February 2000 Board meeting. But they instructed the staff to develop an alternative set of findings and conclusions supporting termination of the franchise.

***498** During the interim period between the November and February Board meetings, Lone Star did not file a reply to Winnebago's exceptions. At the February Board meeting, in addition to the original proposal for decision favorable to Lone Star, the administrative law judge had prepared three alternative proposals supporting termination. With the four proposals before them, the Board again heard argument of counsel. Before turning to the merits of his protest, counsel for Lone Star argued that Winnebago's exceptions were untimely filed, "yet at the last meeting, without discussion, they were considered, and that came out to the detriment of the protestant."

Counsel did not request leave to file a response nor did he explain why he had not filed a response between the two hearings.

[1] Lone Star urges on appeal that the Board improperly considered Winnebago's exceptions to the detriment of Lone Star's substantial rights. Because Director Bray's letter advised the parties that Winnebago's exceptions "should not be considered" and his memorandum advised the Board that they were "not required to read or consider" them, Lone Star complains that Bray misstated the law and that the Board violated the law when it considered the exceptions. By allowing Winnebago to file its exceptions thirteen days after they were due, Lone Star contends that it was denied the right to file a reply to the exceptions because Lone Star could not file a reply by the fifteenth day before the Board meeting as required by the Board's rules. *See* 16 Tex. Admin. Code § 101.63 (2001). Arguing that they were "ramrodded," Lone Star complains that the rules were manipulated to deprive it of a fair, just, and impartial adjudication of its rights. *See id.* § 101.01.

The Board rules of practice and procedure provide for the filing of exceptions within 20 days after the date of service of the hearing officer's report. *Id.* § 101.60. Section 101.60 also addresses extensions of time:

> Requests for extension of time within which to file exceptions shall be filed with the hearing officer and a copy of such request shall be served on all other parties in interest. The hearing officer shall promptly notify the parties of his or her action upon the request and shall allow *additional time only in extraordinary circumstances where the interest of justice so requires.*

Id. (emphasis added). Winnebago's motion asking the Board to consider its exceptions or to grant a continuance satisfied the requirements of section 101.60. *See id.* The motion set forth the circumstances of the service of the exceptions and was accompanied by an affidavit of counsel. The Board properly allowed Winnebago's exceptions to be considered because Winnebago's motion demonstrated, as provided by this rule, "extraordinary circumstances where the interest of justice so requires" such relief. *Id.* Moreover, by facsimile to the parties on October 29, Director Bray advised the parties of his notice to the Board of its two options: that the Board proceed to the merits on November 4 or grant a continuance until February.

The rules further address the filing of documents for consideration by Board members:

> Any document filed by a party to a contested case for consideration by the members of the Board in their decision of the case must be filed with the Board at least 15 days prior to the date of the Board meeting at which the case is scheduled for consideration *and decision.* Any document not filed within such time will not be considered by the members of the Board at that meet ***499** ing.... *For good cause shown, the Board may waive or shorten the requirement for the filing of all documents prior to any Board meeting.*

Id. § 101.63 (emphasis added). The Board may consider only the materials timely submitted. Tex.Rev.Civ. Stat. Ann. art. 4413(36), § 3.08(g) (West Supp.2001).

It undisputed that Lone Star's counsel received a timely copy of the exceptions on October 12, 1999, well in advance of the hearing. On October 20, when counsel for Winnebago learned that the Division had not received the exceptions, he filed a duplicate set. The mailed exceptions arrived at the Division on October 27. The record supports Winnebago's position that the late filing was due to a postal error.

[2] Lone Star did not file a response to Winnebago's exceptions, request additional time to respond to the exceptions, or file a motion for continuance of the November hearing. Lone Star never sought to file a reply on shortened time. When Winnebago filed a motion asking the Board to consider the exceptions or to grant a continuance, Lone Star did not respond. At the November hearing, Lone Star did not object to proceeding on the merits or otherwise request a continuance. Apart from Lone Star's October 21 letter urging the Board not to consider Winnebago's exceptions, Lone Star made no effort to object to the Board's decision to go forward on

November 4. At no time did Lone Star's counsel suggest that his client desired a continuance, that his client was prejudiced by the Board proceeding to the merits, or that it was error for the Board to consider the merits under such circumstances. By not responding to the motion and by acquiescing, without objection, to the Board's decision to proceed to a hearing on the merits, Lone Star waived its complaint.

When the protest was tabled for further consideration until the February meeting, Lone Star again failed to respond to the exceptions. At the February hearing, Lone Star's counsel commented that the exceptions were untimely filed, but he lodged no objection to proceeding with the hearing and made no further request to submit a reply. Because rule 101.63 requires any document to be filed with the Board within fifteen days of the Board's consideration of the matter *and decision,* Lone Star had ample time before the February hearing to file its reply. *See* 16 Tex. Admin. Code § 101.63. At oral argument on appeal, Lone Star's counsel contended that Lone Star did not file a reply between the November 1999 and February 2000 hearings because the Board essentially made its final determination in November and any reply after the November hearing was futile. The record persuades us otherwise.

At the February hearing, the administrative law judge presented three new proposals supporting termination of the franchise. Chairman Barnes reminded the Board that it could allow additional argument. The Board agreed to allow further argument by the parties' counsel. After argument by Lone Star's counsel urging the Board not to adopt any of the three new proposals, counsel introduced the company's owner, Bruce Byrne, to explain why he wanted the Winnebago franchise. Byrne described how the termination would affect his employees and business.

At the conclusion of the Board's discussion of its various options, a Board member made a motion to adopt the administrative law judge's *original* proposal for decision. When the motion failed for lack of a second, another member moved that one of the revisions be adopted. In a close ***500** vote, the motion carried.[8] Contrary to Lone Star's suggestion that the rules were indiscriminately ignored and "sharp practice" was countenanced by the Board, the Board allowed full and ample argument and comment by all who sought to be heard. That Lone Star never sought leave to file its reply, made no attempt to reply, and never objected to the Board proceeding to the merits were strategic decisions made by Lone Star.

Although Lone Star argues on appeal that "there was no justification for denying a continuance to allow Lone Star to have time to file its replies to Winnebago's untimely exceptions," Lone Star, in fact, never sought a continuance, and the Board did not deny a request by Lone Star for a continuance. Instead, Lone Star acquiesced in the Board's proceeding to consider the merits at both hearings. We conclude that the Board did not engage in an unlawful procedure by accepting and considering the exceptions; rather, we hold that the Board properly exercised its discretion "in the interest of justice."

[3] Even if we were to find, however, that the Board engaged in an unlawful procedure, the task at hand is to determine whether Lone Star's substantial rights were prejudiced by the Board's consideration of the exceptions. *See* Tex. Gov't Code Ann. § 2001.174(2). Lone Star does not point to a single argument that it was not permitted to fully make either in its own exceptions or in argument to the Board. Finding that the purpose of the rules—to ensure a fair, just, and effective adjudication of the parties' rights—was served, and that no prejudice to Lone Star's substantial rights occurred, we overrule its first three issues.

B. Board's Finding of "Threats of Violence"

[4] By its fourth issue, Lone Star contends that the Board's reliance on a finding of "threats of violence" to support its decision to terminate the franchise is not supported by evidence in the record. Lone Star does not contend that the Board's order is not supported by substantial evidence; rather, it urges that in focusing unduly on an isolated incident, the Board disregarded the statutory criteria for termination and relied on evidence outside the record. Appellees contend that Lone Star waived its complaint[9] and that the evidence was sufficient to support the Board's order.

The record reflects that, as the relationship between the parties deteriorated, harsh words were exchanged. As one of its grounds to support the termination, Winnebago asserted that Lone Star's conduct was injurious to consumers. Specifically, Winnebago argued that Lone Star did not maintain a current inventory, its actual sales did not meet projections and goals agreed to between the

parties, [10] and Lone Star disparaged Winnebago products to consumers and otherwise failed to actively promote them. Winnebago also contended that the tension and strife between the parties was injurious to the public.

Although Lone Star does not specify the finding to which it objects, in referring to ***501** "threats of violence" and "an aging stroke victim's statement to a third party," we construe its complaint to challenge finding of fact 37. This finding relates to a telephone conversation between Bruce Byrne and a Winnebago employee in which Byrne threatened to throw Larry Gram, a Winnebago sales manager, off Lone Star's lot if he appeared at the dealership. Because Byrne was physically incapable of carrying out the threat, Lone Star contends that Winnebago misconstrued Byrne's hyperbolic outburst and challenges whether this isolated statement supports the finding of fact. Because two Board members made general references to violence in the workplace, Lone Star also objects to the Board's consideration of this evidence because it is outside the record.

Acknowledging that Byrne was not physically capable of carrying out the threat, the administrative law judge found in finding of fact 71 of the original proposal for decision that "Byrne threatened to throw Mr. Gram off the dealership lot" and that the "manufacturer is concerned for the physical safety of his employees who call on Lone Star under the threat of physical violence." This finding was carried over verbatim as finding of fact 37 in the Board's final order.

[5] **[6]** When the evidence is contradictory, we resolve any conflict in favor of the agency's decision. *Auto Convoy Co. v. Railroad Comm'n,* 507 S.W.2d 718, 722 (Tex.1974). In determining whether a finding of fact is reasonably supported by substantial evidence, we may not substitute our judgment for that of the agency on the weight of the evidence. Tex. Gov't Code Ann. § 2001.174. We must, however, test the disputed finding against evidence in the record to determine whether such relevant evidence exists as a reasonable mind might accept as adequate to support a finding of fact. *Lauderdale v. Texas Dep't of Agric.,* 923 S.W.2d 834, 836 (Tex.App.—Austin 1996, no writ).

The evidence in the record supports the challenged finding. In addition to the testimony of Jack Berringer, the district sales manager for Winnebago, and Larry Gram, the Western sales manager for Winnebago, the record contains a dealer contact report describing the incident. We conclude that reasonable minds could infer or find from evidence in the record that Byrne made the statement attributed to him and that Winnebago was reasonably concerned for its employees who might call upon the dealer.

Even apart from the "threat" incident, there was substantial evidence of verbal abuse, hostility, and profanity in the record. The findings of fact contain other findings relating to this type of unprofessional conduct and hostility. Jack Berringer testified about several incidents where Winnebago employees were subjected to profane verbal abuse by Byrne. Gram, too, testified to various episodes of verbal abuse, stating that "in my 20 years in this business, I've never seen a situation develop to the point that this one has developed." Ron Post, the service district manager and special projects manager for Winnebago, testified regarding profane language directed toward him by Gordon Byrne, Lone Star's vice president. The record also contains documentation in the form of Winnebago dealer contact reports and internal memoranda which graphically describe various incidents. The Board's decision was not based on an isolated outburst or a single finding. Lone Star does not challenge the findings relating to other incidents of profane, harsh and abusive language. Moreover, the record discloses that the Board made other findings of fact that support the ultimate findings on the statutory criteria required under section 5.02(b)(5) of the Act, none of which are ***502** challenged by Lone Star. *See* Tex.Rev.Civ. Stat. Ann. art. 4413(36), § 5.02(b)(5) (West Supp.2001).

[7] The gist of Lone Star's challenge to the finding seems to be that comments made by Board members at the November hearing indicate that they were swayed by current events, rather than by evidence in the record. Because two members made brief references to "taking threats in the workplace seriously," Lone Star contends that the Board's decision to terminate was based on concerns of workplace violence not in the record, rather than the evidence before the Board.

We have previously held that it is immaterial what a board member may have said in arriving at her decision and that we look instead to whether the order is reasonably sustained by appropriate findings and conclusions that have support in the evidence. *City of Frisco v. Texas Water Rights Comm'n,* 579 S.W.2d 66,

72 (Tex.Civ.App.—Austin 1979, writ ref'd n.r.e.). To the extent these isolated references may be construed to be references to news events, they are immaterial. On the record before us, however, they can more likely be read to reflect the Board's struggle in apportioning blame and assessing responsibility for the deteriorating franchise relationship. As Board members considered the various options available to them, their deliberations exhibited caution and concern, rather than arbitrariness or capriciousness. They based their decision on statutory criteria supported by evidence in the record. We may not substitute our judgment for that of the agency as to the weight of the evidence on questions committed to agency discretion. Tex. Gov't Code Ann. § 2001.174; *see also Texas Health Facilities Comm'n v. Charter Medical–Dallas, Inc.,* 665 S.W.2d 446, 452 (Tex.1984). We therefore overrule Lone Star's fourth issue.

C. Board's Rejection of Proposal for Decision

[8] **[9]** In its fifth issue, Lone Star complains of the Board's reversal of the proposal for decision prepared by the administrative law judge. Appellees contend that Lone Star has waived this complaint because it was not contained in Lone Star's motion for rehearing submitted to the Board. We agree. This complaint was not presented in any fashion to the Board in Lone Star's motion for rehearing, nor was it presented to the trial court. A motion for rehearing must be sufficiently definite to apprise the agency of the error claimed and to allow the agency the "opportunity to correct the error or to prepare to defend it." *Suburban Util. Corp. v. Public Util. Comm'n of Texas,* 652 S.W.2d 358, 365 (Tex.1983); *Wilmer–Hutchins Indep. Sch. Dist. v. Brown,* 912 S.W.2d 848, 852–53 (Tex.App.—Austin 1995, writ denied); *see also* Tex. Gov't Code Ann. § 2001.145 (West 2000); Tex.R.App. P. 33.1 (to preserve complaint for appellate review the record must show that the complaint was made to the trial court); *Gonzalez v. Texas Educ. Agency,* 882 S.W.2d 526, 527 (Tex.App.—Austin 1994, no writ). Because Lone Star failed to preserve this complaint for review, we overrule its final issue.

CONCLUSION

Having overruled all of Lone Star's issues, we affirm the district court's final judgment which upheld the Board's order finding that Winnebago had established good cause for the termination of Lone Star's Winnebago franchise.

All Citations

49 S.W.3d 492

Footnotes

1 *See* Tex. Gov't Code Ann. § 2001.171 (West 2000).

2 *See* Tex.Rev.Civ. Stat. Ann. art. 4413(36), § 7.01(a) (West Supp.2001). We refer to the Motor Vehicle Commission Code as "the Act." *Id.* §§ 1.02–7.01.

3 Where appropriate, we will refer jointly to the Board and Winnebago as appellees.

4 Section 5.02(b)(3) of the Act requires that, if a dealer files a timely protest with the Board, a termination of the agreement is not effective until the Board makes a determination that the party seeking termination has demonstrated by a preponderance of the evidence that there is good cause for the termination. Tex.Rev.Civ. Stat. Ann. art. 4413(36), § 5.02(b)(3) (West Supp.2001).

5 Under the Board's rules of practice and procedure, the parties were required to file exceptions within twenty days of service of the proposal for decision. *See* 16 Tex. Admin. Code § 101.60 (2001).

6 Under the "mailbox rule," the exceptions were required to be received by the Board by October 12. *See id.* § 101.13(c) ("[D]elivery by mail shall be complete only if such deposit is made on or before said date and the document is received in hand by the Board at its office in Austin not later than the fifth Board business day after the date of such deposit.").

7 Lone Star was entitled to ten days from the date of filing of the exceptions to file a reply. *See id.* § 101.62. A Board rule also prohibits the filing of any material within fifteen days of a Board meeting at which a case will be considered *and decided. Id.* § 101.63. Because October 20—the day Winnebago's exceptions were filed—was the fifteenth day before the Board meeting, and Lone Star claims that it did not learn of the filing until the next day when it received Bray's facsimile, Lone Star contends that it was foreclosed from filing a reply.

8 The Board voted three to two in favor of the motion to allow termination, with Chairman Barnes voting against the motion.

9 Appellees contend that Lone Star was required in its Motion for Rehearing to specify the particular findings or conclusions of which it complains. Because we are able to identify the finding, we will assume Lone Star has not waived error on this issue.

10 Good cause may not be shown by the desire of a manufacturer for market penetration. Tex.Rev.Civ. Stat. Ann. art. 4413(36), § 5.02(b)(5) (West Supp.2001).

End of Document

TAB C

TEXAS MOTOR VEHICLE COMMISSION

FONTANA FORD SALES, Complainant	()	
VS.	()	DOCKET NO. 87-084
FORD MOTOR COMPANY, Respondent	()	

PROPOSAL FOR DECISION

This matter is before the Texas Motor Vehicle Commission as a result of a protest filed with the Commission by Fontana Ford Sales protesting the termination by Ford Motor Company of the Ford Sales and Service Agreement, or franchise agreement, between the parties. The protest was filed pursuant to Section 5.02(3) of the Texas Motor Vehicle Commission Code (Article 4413(36), Texas Revised Civil Statutes), which provides that upon the filing of such a protest, a hearing shall be held by the Commission to determine whether good cause exists for the termination of the agreement.

The protest of the proposed franchise agreement termination was filed with the Commission by the Complainant on December 15, 1986. Thereafter, a public hearing for the taking of evidence was held on April 15, 1987. The hearing was held before Russell Harding, Executive Director of the Commission, who acted in the capacity of Hearing Examiner.

The Complainant, Fontana Ford Sales, was represented at the hearing by the owner of the dealership, Mr. Joseph C. Fontana. Mr. Fontana testified for the Complainant in opposition to the proposed franchise termination.

Respondent, Ford Motor Company, was represented at the hearing by its attorneys, Jill McDonald, Senior Attorney, and Nancy Routzhan, Staff Attorney, Office of the General Counsel, Ford Motor Company, Dearborn, Michigan. Testifying at the hearing as witnesses for Respondent were Marvin J. Ellsworth, District Sales Manager, Ford Division, Houston District Office and Gene Smith, Market Representation Manager, Ford Division, Houston District Office.

The transcript of testimony given at the hearing comprises 84 pages and the record also includes 46 documentary exhibits introduced into evidence by the Respondent. A post hearing brief also was filed by the Respondent. This Proposal for Decision and the findings of fact, conclusions and recommended decision and order contained therein, are based solely upon the record in this case which is comprised of the testimony of the witnesses and other evidence received at the hearing.

ISSUE

The issue to be decided in this case is whether or not good cause exists for the termination by Respondent of the Ford franchise agreement between Respondent and Complainant. This issue must be decided in light of the statutory provision upon which the protest of the termination is based, i.e., Section 5.02(3) of the Code, which provides that notwithstanding the terms of any franchise agreement, it shall be unlawful for any manufacturer to: ". . . terminate or refuse to continue any franchise with a dealer unless (A) the dealer and the Commission have received written notice sixty days before the effective date thereof setting forth the specific grounds for termination or noncontinuance and (B) if the dealer files a protest with the Commission, it is established by a preponderance of evidence at a hearing called by the Commission that there is good cause for the termination or noncontinuance. The Commission shall consider all the existing circumstances in determining good cause, including without limitation the dealer's sales in relation to the market, the dealer's investment and obligations, injury to the public welfare, adequacy of service facilities, equipment, parts and personnel of the dealer and other dealers of new motor vehicles of the same line-make, whether warranties are being honored, and compliance with the franchise agreement. Good cause shall not be shown solely by a desire for further market penetration. If a franchise is terminated or not continued, another franchise in the same line-make will be established within a reasonable time unless it is shown to the Commission that the community or trade area cannot reasonably support such a dealership. If this showing is made, no dealer license shall be thereafter issued in the same area unless a change in circumstances is shown."

OPINION OF HEARING EXAMINER

As indicated earlier, the issue in this case is whether or not good cause has been shown for the termination by Respondent, Ford Motor Company, of the Ford Sales and Service Agreement between it and the Complainant, Fontana Ford Sales, a Ford dealer in Calvert, Texas. In this case there are actually two agreements between Ford and Fontana Ford Sales, these being the Ford Sales and Service Agreement entered into on June 1, 1972 and the Foreign Vehicle Sales Agreement (Fiesta), entered into on May 2, 1977. As used herein, the terms Ford Sales and Service Agreement and Ford franchise agreement will refer to and include both agreements as both are the subject of the proposed termination action by Ford.

Notice of termination of the Ford Sales and Service Agreement was given by Ford to Fontana Ford Sales on October 15, 1986, and a copy of the notice of termination was also sent to the Commission in compliance with the requirements of Section 5.02(3) of the Code. The grounds for termination as stated in

the Ford notice were the failure of Fontana Ford to: (1) maintain the dealership operation open for business during customary business hours; (2) maintain adequate stocks of current model new vehicles; (3) maintain facilities of satisfactory appearance and condition and adequate to meet the dealer's responsibilities; (4) employ and train sufficient personnel to provide normal dealership sales and services functions; (5) reside within the dealer's locality; and (6) maintain adequate lines of wholesale credit (Respondent's Exhibits 29 and 30).

In support of its position that it has good cause to terminate the franchise agreement with the dealer, Ford contends that the dealer has consistently and continually failed to comply with its franchise agreement with Ford in nearly all material respects, even after having been notified of the deficiencies and having been provided with an opportunity to correct the deficiencies. In this regard, Ford states that by letter dated March 27, 1986, Fontana Ford was notified by the Ford Houston District Office of serious deficiencies under the Ford Sales and Service Agreement (Respondent's Exhibit 15) and that as a result of a meeting on April 15, 1986, between Mr. Fontana and the Ford District Sales Manager, to discuss the deficiencies, the dealer was provided with an additional 60 days within which to correct the deficiencies (Respondent's Exhibit 16). It is asserted, however, that Fontana Ford failed to correct or even make significant progress on the most serious deficiencies within the allotted time and that the deficiencies remain uncorrected to the present time. (Ford Post Hearing Brief, p.4).

The specified instances of Fontana Ford's failure to comply with material requirements of the Ford Sales and Service Agreement alleged by Ford and the evidence offered by Ford to establish such failures are as follows:

1. Failure to maintain dealership open for business during customary business hours in violation of Section 7 of the Ford Sales and Service Agreement which provides: "To the end that the needs of customers and owners served by the Dealer are fulfilled properly, the Dealer shall maintain DEALERSHIP OPERATIONS open for business during all hours and days which are customary in the trade and lawful for such operations in the DEALER'S LOCALITY." (Respondent's Exhibit 1, p.11).

Ford's witness Mr. Ellsworth testified that Ford field personnel made numerous attempts to contact Mr. Fontana at the dealership but found the dealership either locked, open but unattended, open with only a mechanic present, or, in the case of telephone contacts, the telephone call went unanswered (Tr. 9-11, 13-15, 18-19, 24-28, 35-38, 42, 81-82; Respondent's Exhibits 6-14, 17-23, 25-28, 31). Sixteen of these unsuccessful contacts occurred after the Ford letter of April 15, 1986, providing Fontana Ford with an opportunity to correct the failure to keep

the dealership open during normal business hours. In addition, interviews with the local chief of police and an employee of a business across from the Fontana Ford dealership confirmed that the dealership was not open on a regular basis (Respondent's Exhibit 2). Finally, Ford has received complaints from Ford customers indicating that in attempting to get their vehicles serviced at Fontana Ford, they found the dealership closed during the day (Respondent's Exhibits 27 and 28). Other testimony offered by Ford established that competing dealers in Hearne and Bremond, Texas, all maintained normal business hours from 8:00 a.m. to 5:00 or 6:00 p.m. Monday through Friday for sales and service and from 8:00 a.m. to 12:00 p.m. on Saturday for sales operations, while Fontana Ford did not maintain normal business hours in comparison with these dealers (Tr. 68; Respondent's Exhibit 38).

Ford concludes that by its failure to remain open during hours customary in the market area, Fontana Ford has violated Section 7 of the Ford Sales and Service Agreement and also deprives consumers of access to dealership services including the fulfillment of warranty obligations.

2. Failure to develop and maintain a trained, quality vehicle sales and service organization in violation of Paragraph 6(b) of the Ford Sales and Service Agreement which provides: "The Dealer shall employ and train such numbers and classifications of competent personnel of good character, including, without limitation, sales, parts, service, owner relations and other department managers, salesmen and service technicians, as will enable the Dealer to fulfill all his responsibilities under this agreement. The Company shall provide assistance to the Dealer in determining personnel requirements. In response to the training needs of the Dealer's personnel, the Dealer at his expense shall cause his personnel to attend training schools or courses conducted by the Company from time to time." (Respondent's Exhibit 1, p.9).

The testimony of the Ford witnesses was that the total staff of Fontana Ford consists primarily of Mr. Fontana, his wife and one mechanic (Tr. 10, 64), while the Ford Staffing Guide for a dealership with Fontana Ford's planning volume should maintain a staff of between six to ten people to adequately fulfill its obligations as a Ford dealer (Tr. 65). The testimony further indicates that other Ford dealers in the Houston District with planning volumes comparable to that of Fontana Ford are adequately staffed (Tr. 65-66; Respondent's Exhibit 36), and finally, Ford offered into evidence Mr. Fontana's acknowledgement to the Ford Dealer Policy Board that he does not have a trained sales organization (Respondent's Exhibit 32). From this evidence, Ford concludes that Fontana Ford's failure to comply with Paragraph 6(b) of the Ford Sales and Service Agreement precludes it from properly serving the residents of the market area.

3. Failure to maintain an adequate stock of current new model vehicles in violation of Paragraph 2(d) of the Ford Sales and Service Agreement which provides: "The Dealer shall maintain stocks of current models of such lines or series of VEHICLES, of an assortment and in quantities as are in accordance with Company GUIDES therefor, or adequate to meet the Dealer's share of current and anticipated demand for VEHICLES in the DEALER'S LOCALITY. The Dealer's maintenance of VEHICLE stocks shall be subject to the Company's filling the Dealer's orders therefor." (Respondent's Exhibit 1, p.5).

In support of its assertion of a violation by the dealer of Paragraph 2(d) of the Ford Sales and Service Agreement, Ford refers to Respondent's Exhibits 4, 15, 16 and 24, which document Fontana Ford's failure to maintain adequate stocks of new vehicles and evidence Ford's notification to the dealer of this failure. Ford also relies upon the acknowledgement of this deficiency by Mr. Fontana before the Ford Dealer Policy Board (Respondent's Exhibit 32) and at the hearing (Tr. 50) by his admission that 99 percent of his sales are from special retail orders. Ford contends that the dealer's failure to maintain adequate stocks of current new model vehicles injures Ford's representation in the market and deprives the consuming public in the area of the opportunity to inspect and drive a variety of vehicles to enable them to make an informed decision in the purchase of a new vehicle.

4. Failure to maintain an adequate line of wholesale credit in violation of Paragraph 6(d) of the Ford Sales and Service Agreement which provides: "The Dealer shall at all times maintain and employ in connection with his DEALERSHIP OPERATIONS separately from any other business of the Dealer, such total investment, net working capital, adequate lines of wholesale credit and competitive retail financing plans for VEHICLES as are in accordance with Company GUIDES therefor and will enable the Dealer to fulfill all his responsibilities under this agreement. The Dealer's net working capital shall not be less than the amounts specified in the Net Working Capital Agreement executed by the Dealer and the Company, as a part of and simultaneously with this agreement, as modified or superseded from time to time." (Respondent's Exhibit 1).

In support of its assertion of a violation by the dealer of Paragraph 6(d) of the Ford Sales and Service Agreement, Ford relies upon Mr. Fontana's admission to the Ford Dealer Policy Board that his dealership had not had a wholesale line of credit for a number of years (Respondent's Exhibit 32). While the dealer did secure a $60,000 line of credit in December 1986, this occurred after Ford's notice of termination and even this credit line would not be sufficient to enable the dealer to stock a sufficient number of vehicles in inventory to meet minimal stocking levels (Tr. 60). Ford concludes from this failure to

maintain an adequate credit line that the dealer is precluded from stocking a representative mix of new Ford vehicles to respond to the wants and needs of the buying public.

5. Failure to maintain facilities of satisfactory appearance and condition adequate to meet dealership sales agreement responsibilities in violation of Paragraph 5(a) of the Ford Sales and Service Agreement which provides: "The Dealer shall establish and maintain at the DEALERSHIP LOCATION approved by the Company DEALERSHIP FACILITIES of satisfactory appearance and condition and adequate to meet the Dealer's responsibilities under this agreement. The DEALERSHIP FACILITIES shall be substantially in accordance with the GUIDES therefor established by the Company from time to time." (Respondent's Exhibit 1, p.8).

In support of its assertion of a violation by the dealer of Paragraph 6(d) of the Ford Sales and Service Agreement, Ford relies upon the testimony of the Houston District Sales Manager that the physical appearance of the dealership was poor and in need of repair (Tr. 9; Respondent's Exhibit 2) and that despite being provided with an opportunity to cure the deficiency and despite some progress having been made, additional work on the facility needs to be performed (Respondent's Exhibit 24).

6. Failure of the dealer principal to reside within the dealership's dealer locality in violation of Paragraph 6(c) of the Ford Sales and Service Agreement which provides: "Effective operation of the Dealer's business is dependent in large part on the Dealer's management becoming a part of and accepted within his local community. Accordingly, each person named in subparagraph F(ii) hereof shall (unless otherwise approved in writing by the Company because of individual circumstances) reside within the DEALER'S LOCALITY." (Respondent's Exhibit 1, p. iv and 9).

In support of its assertion of a violation by the dealer of Paragraph 6(c) of the Ford Sales and Service Agreement, Ford relies upon Mr. Fontana's admission to the Ford Dealer Policy Board that he resides in College Station, Texas, approximately 25 to 30 miles from Calvert, and Mr. Fontana's testimony in this proceeding that he had to leave Calvert (Tr. 53).

7. Failure to actively and vigorously sell Ford products and achieve a reasonable and realistic share of its market in violation of Paragraph 2(a) of the Ford Sales and Service Agreement which provides: "The Dealer shall promote vigorously and aggressively the sale at retail (and if the Dealer elects, the leasing and rental) of cars and trucks to private and fleet customers within the Dealer's Locality, and shall develop energetically and satisfactorily the potentials for such sales and obtain a reasonable share thereof . . ." (Respondent's Exhibit 1, p.3).

In support of its assertion of a violation by the dealer of Paragraph 2(a) of the Ford Sales and Service Agreement, Ford relies upon the testimony of its witness, Gene Smith, that Fontana Ford sells very few of the Ford vehicles registered in the Calvert market area (Tr. 61) and the sales performance analysis prepared by Mr. Smith (Respondent's Exhibit 34) which shows that during the three-year period of 1983, 1984 and 1985, Fontana Ford registered only two Ford cars in the Calvert market area and no Ford trucks. In addition, Ford produced a cross-sell report showing registrations of Ford cars and trucks in the Calvert market by other Ford dealers and this report shows that the Ford dealers in Hearne and Bryan sold virtually all of the Ford cars and trucks registered in the Calvert market area in 1983, 1984 and 1985, this being 108 units out of a total of 180, while Fontana Ford registered only two cars in the Calvert area, and in fact had a total of only 12 new Ford car and truck sales during this three-year period (Tr. 62-63; Respondent's Exhibit 35).

8. Failure to provide warranty service to purchasers of Ford vehicles in the Fontana Ford dealer locality. In support of its contention that the dealer has failed to provide warranty service to Ford customers, Ford relies upon the testimony of its witness, Gene Smith, that Fontana Ford's warranty service to Ford customers has been minimal or nonexistent over the past several years (Tr. 69) and an analysis made by Mr. Smith of warranty reimbursement payments made by Ford to Fontana Ford and other dealers with similar planning volumes (Respondent's Exhibit 39). The warranty reimbursement analysis shows a total of $287.05 in 1982; $588.51 in 1984; and $0 in 1985. In 1983 and 1986, charges to the dealer for extended warranties exceeded the amount of any warranty reimbursement claims indicating that such claims were negligible. Ford asserts that as a result of the dealer's failure to maintain normal business hours and provide warranty service has resulted in Ford owners in Calvert having to go to other Ford dealers for warranty service.

Ford contends that the foregoing evidence clearly establishes that Fontana Ford has abandoned its franchise as well as Ford owners and buyers in the Calvert market and that it is not in the best interests of the public, the manufacturer or other Ford dealers to permit such pervasive and flagrant nonperformance to exist by allowing Fontana Ford to retain its franchise. Ford concludes that it has established by a preponderance of the evidence that good cause exists for the termination of Fontana Ford's Sales and Service Agreement and it urges the Commission to deny to dealer's protest (Ford Post Hearing Brief, pp. 15-16, 18).

Finally Ford states that the Calvert market is not sufficient to support a replacement dealer and that its intention is to reassign the Calvert area to the Ford dealer in Hearne,

Texas, which is only nine miles from Calvert. The evidence shows that the Ford dealer in Hearne already sells more Ford vehicles in the Calvert market area than any other dealer including Fontana Ford (Tr. 45, 71; Respondent's Exhibit 35). Thus, it is contended, the most logical action is to reassign the Calvert area to the Hearne Ford dealer. (Ford Post Hearing Brief, pp. 17-18).

Under the statute, the manufacturer has the burden of establishing the existence of good cause for the termination of a franchise agreement with one of its dealers. In this case, there can be little question but that Ford has more than satisfied its burden of proof. The evidence offered by Ford clearly establishes numerous violations of the Ford Sales and Service Agreement by the dealer, most of which are material and significant violations of the agreement, and in addition the evidence demonstrates the failure of the dealer to maintain an active Ford dealership to provide sales and service representation for Ford products to serve the public in the dealer's market area.

No evidence was offered by Fontana Ford to rebut the specific examples of dealership deficiencies and franchise agreement violations presented by Ford. Mr. Joe Fontana testified that he has been a Ford dealer for 25 years and has worked diligently at being a Ford dealer (Tr. 46). He acknowledged that he has had problems with his mechanics and salesmen, but now that some industrial activity is starting to occur in Calvert that will employ about 2,000 people, he believes the day is approaching when he can made some money out of the business (Tr. 47). Mr. Fontana stated that after 25 years in the business, he and his wife can outsell anyone and while he concedes that he does not spend every minute at the dealership, this is because he believes he has to get out and contact people who are interested in buying a car or truck (Tr. 49). He denied that he has abandoned the business or that the dealership is closed most of the time and the only time the store is closed is when his wife is at lunch or goes to the bank or post office (Tr. 52-53). He stated that he is at the dealership sometimes seven days a week (Tr. 52-53). Concerning the unanswered phone calls, Mr. Fontana testified that he has had problems with the phone system for years and years, including problems of mice eating the phone lines, so the phones don't always ring (Tr. 49-50).

Mr. Fontana further testified that his dealership is a little dealership and 99 percent of his sales are special orders (Tr. 50), so he cannot stock 15 cars with the economy of the area in its current state (Tr. 50). He stated that he has tried to fix the place up and he believes the facility is great for a small town (Tr. 51, 52). He testified that he has invested a lot of money in his business and has tried to participate in Ford programs and be a faithful Ford dealer and the only livelihood he

has is working as a Ford dealer (Tr. 52-53). He would like to get something back on his investment by selling the dealership (Tr. 54). Mr. Fontana stated that he believes Ford is dissatisfied with his refusal to participate in all of the Ford programs and he believes he has been discriminated against in his retail orders because he did not sign up for all of the programs (Tr. 55). Mr. Fontana concluded his testimony by stating that while he has had some problems, he has represented Ford all these years and has tried to improve and has worked hard for Ford for 25 years, but if Ford does not want him as a dealer, then he feels that he should at least be allowed to have some return on his investment (Tr. 54-56).

In response to questions, Mr. Fontana acknowledged that he has a real estate broker's license, but he does not engage in the real estate business (Tr. 79-80), and he further acknowledged that at one time he did operate a restaurant in Bryan-College Station, but he does not have a restaurant now (Tr. 79, 83). He has never submitted any buy-sell proposals for the dealership to Ford either before or after the termination notice (Tr. 83).

Having carefully considered all of the evidence presented by the parties in this case, it is the opinion of the Hearing Examiner that Ford has established by a preponderance of the evidence that good cause exists for the termination of the Ford franchise agreement with Fontana Ford and therefore the protest of the termination by the dealer should be denied. While it is always regrettable to have to recommend the termination of a dealer's franchise agreement, in this case the evidence compels such a recommendation. The evidence presented by Ford very clearly shows that Fontana Ford has not been operated as an active Ford dealership for a number of years, has not actively sold Ford products, and has not provided service to Ford customers. While Mr. Fontana states that he has faithfully represented Ford for 25 years such assertion is simply not credible in view of the evidence of numerous Ford field representative contacts showing the dealership to be closed, or with only Mrs. Fontana or a mechanic on the premises; the evidence of unanswered phone calls indicating no one present at the dealership; the evidence of customer complaints of being unable to obtain service because the dealership was closed; the evidence showing that the dealer sold a total of only 12 new Ford cars over the three-year period from 1983 through 1985; and the evidence showing that the dealer registered only two Ford cars and no Ford trucks in the Calvert market during this year period. While Calvert is admittedly a small town having about 2,000 residents (Tr. 54), the evidence shows that in the Calvert market area designated as Fontana Ford's primary market, there 335 new car and truck registrations in 1983, 351 new car and truck registrations in 1984 and 387 new car and truck registrations in 1985 (Respondent's Exhibit 34). Thus, even in this small market, the dealer's performance in representing Ford products is

virtually nonexistent. From all of the evidence, the conclusion is inescapable that Fontana Ford is not an active Ford dealership, is not representing Ford or providing service to the public and therefore the termination of the dealer's franchise agreement should not be prevented by the Commission.

Upon termination of the franchise agreement, Mr. Fontana should be accorded all benefits provided in the agreement to dealers upon termination, and Ford has agreed that this will be done (Tr. 77-79).

Finally, Ford should not be required to reestablish dealership representation in Calvert, Texas, as there is no compelling reason to do so, and the area should be reassigned to the nearest Ford dealer as is proposed by Ford.

FINDINGS OF FACT

1. Complainant, Fontana Ford Sales, is a franchised Ford dealer in Calvert, Texas (Tr. 9, 46).

2. Complainant and Respondent Ford Motor Company are parties to franchise agreements dated June 1, 1972 and May 2, 1977, under which Complainant is appointed as an authorized dealer for the sale and service of Ford products (Respondent's Exhibits 1 and 29).

3. By letter dated October 15, 1986, Respondent gave formal notice to Complainant of Respondent's intention to terminate the franchise agreements between the parties for the reasons stated in the termination notice (Tr. 40; Respondent's Exhibit 29). A copy of the termination notice was sent by Respondent to the Texas Motor Vehicle Commission as required by the Code (Tr. 41; Respondent's Exhibit 30).

4. The grounds for termination as stated in Respondent's notice of termination were the failure of the dealer to: (1) maintain the dealership operation open for business during customary business hours; (2) maintain adequate stocks of current model new vehicles; (3) maintain facilities of satisfactory appearance and condition and adequate to meet the dealer's responsibilities; (4) employ and train sufficient personnel to provide normal dealership sales and service functions; (5) reside within the dealer's locality; and (6) maintain adequate lines of wholesale credit (Respondent's Exhibits 29 and 30).

5. Complainant Fontana Ford Sales has in fact failed to maintain the dealership open for business during customary business hours as evidenced by numerous contacts at the dealership which found the dealership either locked, open but unattended, open with only a mechanic present or, in the case of

telephone contacts, the telephone call went unanswered (Tr. 9-11, 13-15, 18-19, 24-28, 35-38, 42, 81-82; Respondent's Exhibits 2, 6-14, 17-23, 25-28, 31).

6. The failure of Complainant to maintain its dealership open for business during customary business hours not only violates Section 7 of the Ford Sales and Service Agreement but also deprives Ford customers of the ability to obtain service for their vehicles (Respondent's Exhibits 1, 27 and 28).

7. Complainant Fontana Ford Sales has failed to develop and maintain a trained, quality vehicle sales and service organization, as evidenced by the fact that its total staff consists of the owner, the owner's wife and one mechanic (Tr. 10, 64-66; Respondent's Exhibits 32 and 36).

8. The failure of Complainant to develop and maintain a trained, quality vehicle sales and service organization not only violates Paragraph 6(b) of the Ford Sales and Service Agreement but also precludes the dealer from properly serving the public in its market area (Tr. 10, 64-66; Respondent's Exhibits 1, 32 and 36).

9. Complainant Fontana Ford Sales has failed to maintain an adequate stock of current new model vehicles as conceded by the owner of the dealership and verified by Respondent's records of dealers' inventories and sales (Tr. 14, 50; Respondent's Exhibits 4, 15, 16, 17, 24, 32 and 35).

10. The failure of Complainant to maintain an adequate stock of current new model vehicles not only violates Paragraph 2(d) of the Ford Sales and Service Agreement but deprives the consuming public in the area of the opportunity to inspect and drive a variety of vehicles to enable them to make an informed decision in the purchase of a new vehicle (Respondent's Exhibits 1, 4, 15, 16, 17, 24, 32 and 35).

11. Complainant Fontana Ford Sales has failed to maintain an adequate line of wholesale credit as conceded by the owner and verified by Ford records (Tr. 60; Respondent's Exhibit 32).

12. The failure of Complainant to maintain an adequate line of wholesale credit not only violates Paragraph 6(d) of the Ford Sales and Service Agreement but also precludes the dealer from maintaining an inventory of Ford products for the benefit of those members of the public interested in Ford products (Tr. 60; Respondent's Exhibits 1, 4, 15, 16, 17, 24 and 32).

13. Complainant Fontana Ford Sales has failed to maintain its dealership facilities in satisfactory appearance and condition as evidenced by the testimony of Respondent's witnesses and reports of inspection of the facility (Tr. 9, 51; Respondent's Exhibits 2 and 24).

14. The failure of Complainant to maintain its dealership facilities in satisfactory appearance and condition not only violates Paragraph 6(d) of the Ford Sales and Service Agreement but also adversely affects the dealership's representation of Ford and its products (Respondent's Exhibit 1).

15. The owner and dealer principal in the Fontana Ford Sales dealership does not reside in the dealer locality as required by Paragraph 6(c) of the Ford Sales and Service Agreement (Tr. 53; Respondent's Exhibits 1, 15, 16, 26 and 32).

16. Complainant Fontana Ford Sales has failed to actively and vigorously sell Ford products and achieve a reasonable and realistic share of its market as evidenced by the Ford sales and registration analysis which shows that Fontana Ford Sales registered only two new Ford cars and no Ford trucks in its own market area during the three-year period from 1983 through 1985, while Ford dealers from outside the market area accounted for the vast majority of Ford registrations in the Calvert market (Tr. 61-63; Respondent's Exhibits 34 and 35).

17. The failure of Complainant to actively and vigorously sell Ford products and achieve a reasonable and realistic share of its market constitutes a violation of Paragraph 2(a) of the Ford Sales and Service Agreement (Tr. 61-63; Respondent's Exhibits 1, 34 and 35).

18. Complainant Fontana Ford Sales has failed to provide warranty service to purchasers of Ford vehicles as evidenced by the testimony of Respondent's witnesses and Respondent's analysis of warranty reimbursement payments showing that the dealer's warranty service to Ford customers has been minimal or nonexistent over the past several years (Tr. 69; Respondent's Exhibit 39).

19. Respondent Ford Motor Company has established by a preponderance of the evidence that Complainant Fontana Ford Sales has failed to comply with various material and significant provisions of the Ford Sales and Service Agreement and has failed to maintain and operate an active Ford dealership capable of providing sales and service representation for Ford products to serve the public in the dealer's assigned market area (Findings of Fact 5 through 18).

20. Respondent Ford Motor Company has established by a preponderance of the evidence that good cause exists for termination of its Ford Sales and Service Agreement with Complainant (Findings of Fact 4 through 18).

CONCLUSIONS

1. Respondent has complied with the notice requirements of Section 5.02(3) of the Code with respect to the termination of Complainant's Ford franchise agreement.

2. Respondent has established by a preponderance of the evidence that good cause exists for termination of Complainant's Ford franchise agreement, as required under Section 5.02(3) of the Code.

3. The Calvert, Texas community cannot reasonably support a replacement Ford dealership; can be adequately served by other Ford dealers in the area; and therefore Ford dealership representation need not be reestablished by Respondent.

RECOMMENDED ACTION

The Hearing Examiner recommends that the Texas Motor Vehicle Commission enter an order in this proceeding providing as follows:

1. That the protest of the Complainant in the instant proceeding be dismissed; and

2. That no further action be taken by the Commission to prevent the termination by Respondent of its franchise agreement with Complainant.

Date: **September 10, 1987.**

Russell Harding, Hearing Examiner
Texas Motor Vehicle Commission

TAB D

TEXAS DEPARTMENT OF TRANSPORTATION
MOTOR VEHICLE BOARD

FUN MOTORS OF LONGVIEW, INC.,	§	
Complainant	§	
	§	**DOCKET NO. 96-621**
v.	§	
	§	
KAWASAKI MOTORS CORP., U.S.A.,	§	
Respondent	§	

PROPOSAL FOR DECISION

This matter arises from a protest filed with the Motor Vehicle Board of the Texas Department of Transportation by Fun Motors of Longview, Inc. (Fun Motors), Complainant, contesting the termination by Kawasaki Motors Corp., U.S.A. (Kawasaki), Respondent, of the Kawasaki Authorized Dealer Sales and Service Agreement (Dealer Sales Agreement) between Complainant and Respondent. The protest was filed pursuant to the Texas Motor Vehicle Commission Code, TEX. REV. CIV. STAT. ANN. art. 4413(36), §5.02(b)(3) (Vernon 1996) (TMVC Code) on or about July 17, 1996. This provision of the TMVC Code provides that upon filing of such protest, a hearing shall be called by the Board to determine whether good cause exists for the termination of the franchise agreement.

The hearing on the merits was held January 28 - January 29, 1997 before Cecile Hanna, Administrative Law Judge (ALJ). The Respondent was represented by Lloyd E. Ferguson, Attorney, of Strasburger & Price in Austin, Texas. Testifying on behalf of Kawasaki were Tony Moseley, Kawasaki District Manager; Tony Murr, Kawasaki Regional Manager; Donald J. Brown, of DJB Associates and expert witness regarding motorcycle industry market research, sales and analytical forecasting; and Randall Latch, owner of Fun Motors of Longview, Inc. (testifying as an adverse witness). The Complainant was represented by Mark D. Strachan, Attorney, of Smead, Anderson, Wilcox & Dunn in Longview, Texas. Testifying on behalf of Fun Motors was Randall Latch, owner of Fun Motors of Longview, Inc.

The record consists of the transcript of the testimony which comprises 587 pages, various exhibits introduced into evidence by the parties, and the briefs filed by the parties. This proposal for decision, including the findings of fact, conclusions of law, and recommended Order is based solely upon the argument and evidence of record in this case.

Based upon consideration of all of the factors and issues raised in the above referenced record, as well as the applicable law, the ALJ recommends that the Board deny Fun Motors' protest and allow Kawasaki to proceed with the termination of the Kawasaki Authorized Dealer Sales and Service Agreement with Fun Motors.

ISSUES

Pursuant to Section 5.02(b)(3)(A)(iv) of the TMVC Code, Kawasaki must establish by a preponderance of the evidence that there is good cause for the proposed termination or non-continuance of Fun Motors' franchise. Section 5.02(b)(5) of the TMVC Code further provides that the Board shall consider all of the existing circumstances, including the following factors, in its determination of good cause:

(A) the dealer's sales in relation to the sales in the market;

(B) the dealer's investment and obligations;

(C) injury to the public welfare;

(D) the adequacy of the dealer's service facilities, equipment, parts, and personnel in relation to those of other dealers of new motor vehicles of the same line-make;

(E) whether warranties are being honored by the dealer;

(F) the parties' compliance with their franchise agreement; and

(G) the enforceability of the franchise agreement from a public policy standpoint, including, without limitation, issues of the reasonableness of the franchise agreement's terms, oppression, adhesion, and the relative bargaining power of the parties.

This provision also states that good cause shall not be shown solely by the desire of the manufacturer for market penetration. No evidence in the record or argument raised by the parties indicated whether warranties were being honored by the dealer, however, all other factors under TMVC Code § 5.02(b)(5) are addressed.

BACKGROUND AND PROCEDURAL HISTORY

In July 1988, Fun Motors added the Kawasaki line to its existing Honda dealership located in Longview, Texas. (Tr. 13-14) Fun Motors added Polaris ATVs to its dealership operations in July 1990. (Tr. 521) A Notice of Proposed Termination was sent to Fun Motors by Kawasaki on September 7, 1994. The reasons for termination were stated as follows:

(1) failure of the dealership to maintain its account with Kawasaki on a current basis in accordance with Kawasaki's terms and conditions of sale;

(2) failure of the dealership to pay its debts in the ordinary course of business;

(3) inability of the dealership to pay its debts as they became due;
(4) failure to provide prompt payment on the sale of Kawasaki products which were subject to flooring or other financing agreements as required by the terms and conditions of the Flooring and Financing Agreement;
(5) failure to acquire and maintain a line of credit in the requisite amount to be used exclusively for Kawasaki motorcycles with a financial institution satisfactory to Kawasaki;
(6) failure to provide Kawasaki with current accurate financial information as requested;
(7) failure to maintain adequate inventory of Kawasaki products to meet consumer demand;
(8) failure to aggressively merchandise and market Kawasaki products;
(9) failure to provide Kawasaki products with representation at least equal to that which the dealer provided other brands or lines of products sold by the dealer which are competitive with Kawasaki products;
(10) failure to comply with the terms and conditions of the Sales and Service Agreement; and
(11) failure to conduct business in a manner which reflects favorably on the good name and reputation of Kawasaki and the Kawasaki product.

It is Kawasaki's position that the first five elements arose when Fun Motors became "out of trust"[1] by selling approximately $50,000 worth of products and failing to pay off its corresponding floorplan financier. As a result, the dealer lost its floor plan financing.(Tr. 30-31) In response to Kawasaki's Notice of Termination letter, Mr. Latch requested a meeting to discuss resolution of these issues which was held on October 17, 1994. In attendance at the meeting were Mr. Latch (owner of Fun Motors), Mr. Moseley (Kawasaki District Manager) and Mr. Murr (Kawasaki Regional Manager). (Tr. 34) Mr. Latch was presented a settlement agreement by the Kawasaki representatives. According to the terms of the agreement, Fun Motors agreed to provide prompt payment to its flooring line finance source, maintain a 90-day inventory of products and accessories, reach district average performance standards during calendar year 1995, and represent Kawasaki equally with other brands. In return, Kawasaki agreed to withdraw its September 7, 1994, Notice of Termination. (Tr. 37-38) The out of trust situation was ultimately cured by Fun Motors. The dealer began paying cash for products and his floorplan financing was reinstated by putting up collateral for purchases. (Tr. 127)

The agreement also stated that if Fun Motors failed to meet its obligations under the settlement agreement, it would constitute a material and substantial breach of the Dealer Sales Agreement which by the terms of the agreement is good cause for termination. Fun

[1] "Out of trust" arises when a dealer sells product that the dealer has financed and instead of using the sale proceeds to retire the outstanding balance on the product, the dealer uses the proceeds for other purposes. (Tr. 22-23)

Motors also agreed not to protest any future termination sought by Kawasaki based on Fun Motors' failure to comply with any part of the settlement agreement. (Exh. K-3) During 1995, Mr. Moseley communicated with Mr. Latch to advise him of his performance standards as set forth in the settlement agreement. (Tr. 49-50) During these meetings and phone conversations, Mr. Moseley expressed concern in regard to marketing and advertising, as well as the dealership's apparent failure to maintain the district average performance standards during calendar year 1995. (Tr. 58-59) In October 1995, Fun Motors added the Suzuki line to its dealership operations. (Tr. 63,412)

In March 1996, Mr. Murr sent a letter to Fun Motors advising Mr. Latch that he had not achieved the district average sales performance levels as set forth in the settlement agreement. This letter requested that Mr. Latch voluntarily terminate the franchise agreement. (Exh. K-6) Mr. Latch responded by letter on April 9, 1996, and rejected Kawasaki's suggestion for dealer voluntary termination. (Tr. 459-460) After receiving Mr. Latch's letter, Kawasaki forwarded a Notice of Termination to Fun Motors dated June 6, 1996. (Exh. K-6) Fun Motors filed its protest with the Motor Vehicle Division on July 17, 1996. The June 6, 1996, Notice of Termination indicates the following reasons for the proposed termination: (Exh. K-8)

(1) your failure to provide Kawasaki products with representation at least equal to that which you provide other brands or lines of products sold by you which are competitive with Kawasaki products;
(2) your failure to aggressively merchandise and market Kawasaki products;
(3) your failure to maintain reasonable market share;
(4) your failure to meet the terms set forth in the Settlement Agreement between Kawasaki and Fun Motors executed October 17, 1994;
(5) your failure to comply with the terms and conditions of the Dealer Sales and Service Agreement; and
(6) your failure to conduct business in a manner that reflects favorably on the good name and reputation of Kawasaki and Kawasaki products.

On September 23, 1996, Kawasaki filed a Motion to Dismiss which was denied by the Administrative Law Judge. In closing statement Kawasaki requests that the Board reconsider its Motion to Dismiss. Kawasaki argues that Fun Motors waived its right to protest and lacks standing to bring this protest.

Kawasaki believes that Fun Motors waived its right to protest by entering into the settlement agreement because Fun Motors agreed to the following provision: "Dealer agrees not to protest any termination sought by KMC [Kawasaki Motor Corp.] based on Dealer's failure to comply with any part of this agreement."[2] Kawasaki argues that Texas courts favor compromise and settlement into which parties have voluntarily entered and

[2] October 17, 1994, Settlement Agreement, Paragraph Q

[the agreement] "must stand and be enforced."[3] Kawasaki maintains that in fairness to all parties, Fun Motors has waived its right to protest and cannot withdraw from the agreement arbitrarily when it exercised its own choice by entering into the agreement. Kawasaki contends that the policy favoring settlement overrides Protestant's statutory right to protest. Similarly, Kawasaki argues that Fun Motors assigned all rights to protest any subsequent termination action to Kawasaki as a result of the dealer's breach of certain provisions of the settlement agreement. Kawasaki maintains that Fun Motors now lacks standing in this action because Kawasaki has been assigned the protest right.

Fun Motors maintains that the settlement agreement did not waive its statutory right to protest due to the following reasons: (1) the TMVC Code does not provide for pre-notice waiver; (2) Fun Motors could not waive its right to protest the termination based on the conduct alleged to have occurred subsequent to the 1994 settlement agreement since new grounds were alleged in support for the later termination action; (3) the "waiver" was the result of a non-negotiable onerous "agreement" by which Kawasaki sought to place itself above the requirement of the TMVC Code; and (4) Kawasaki is estopped from claiming a waiver of the provisions of the TMVC Code since it elected to proceed with the June 6, 1996, notice of termination under the TMVC Code; therefore, the parties must proceed according to all of the statutory requirements and protections.

On November 4, 1996, the Administrative Law Judge denied Kawasaki's Motion to Dismiss. The ALJ ruled that by entering into a settlement agreement pursuant to Kawasaki's September 7, 1994, Notice of Termination, Fun Motors cannot be held to have waived its right to protest Kawasaki's subsequent termination notice on June 6, 1996. Additionally, Fun Motors has standing to protest the proposed termination by Kawasaki.

The hearing on the merits was scheduled for December 10, 1996, and was continued to January 28 - 29, 1997, due to a motion filed by Fun Motors stating that it had accepted an offer from Jim Gratton to purchase its Kawasaki dealership. However, at the time of hearing, the sale had not been finalized and to date, the ALJ has not received notice of a change in the dealership ownership status and/or confirmation from Kawasaki of approval of Mr. Gratton as its franchisee.

EVIDENCE AND ARGUMENT PRESENTED AND OPINION OF THE ALJ

I. The Dealer's Sales in Relation to Sales in the Market

Mr. Moseley testified that in an effort to resolve the issues arising from the factors set out in the September 7, 1994, termination notice, Fun Motors requested the October 17, 1994, meeting. The meeting was attended by Mr. Latch, Mr. Murr and Mr. Moseley, and the parties executed the settlement agreement. Mr. Moseley testified further that the

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[3] Kawasaki cites several cases in support of its argument. The most recent is *Pearce v. Texas Employers Ins. Assoc.*, 403 S.W.2d 493, 498 (Tex.Civ.App.--Dallas 1996), *affm'd* 412 S.W.2d 649 (*Tex.*1967).

settlement agreement was reviewed by Mr. Murr, Mr. Latch and himself on a paragraph-by-paragraph basis. Mr. Latch was advised that he could take the agreement and have an attorney review it before he signed it. Mr. Moseley stated that Mr. Latch consented to the terms of the agreement and signed it that day. Further, Mr. Moseley testified at the time of signing Mr. Latch said that he thought he could bring his sales performance up to the district average by the end of 1995. (Tr. 34-38 and Exh. K-3)

However, by the end of 1995, Fun Motors' Longview SMSA[4] sales performance dropped below the 1994 levels[5] and as a consequence, the dealership did not meet the district average for 1995. Mr. Moseley also presented evidence that Kawasaki kept Fun Motors apprised of its 1995 sales performance by providing the dealership Motorcycle Industry Council (MIC)[6] market share data on a monthly basis and informing Mr. Latch on at least four occasions during 1995 that his performance was still below the district average. Mr. Moseley added that on each occasion Mr. Latch again responded that he believed he could pull his numbers up and meet the terms of the agreement. (Tr. 49-57)

In preparation for this hearing Kawasaki enlisted Donald J. Brown to conduct market research. Mr. Brown is with DJB Associates and is an expert regarding motorcycle industry market research, sales, and analytical forecasting. In support of its market share arguments, Kawasaki asserts that a dealer's sales performance can be measured on both an *inter*brand and an *intra*brand basis. An interbrand comparison allows a manufacturer to establish what market share it is receiving in a given market against competing lines. With an intrabrand comparison, a dealer's sales in relation to the market are measured by calculating his percentage of total sales for a particular brand versus other dealers of the same brand in that market.

Mr. Brown's report,[7] along with final 1996 calendar year MIC data, demonstrates that Fun Motors' 1995 interbrand sales performance in the Longview SMSA was substantially below its 1994 performance and the 1995 district average.[8] Kawasaki

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[4] Includes the area of residents in the Longview metropolitan statistical area and Fun Motors is the only Kawasaki dealer in the greater Longview metropolitan area.

[5] In 1994, Kawasaki's market share for motorcycles in Fun Motors' area was 11.96% versus a district average of 20.73%. Similarly, for ATVs, Kawasaki's market share in the Longview SMSA was 13.50% against a district average of 24.53%. (Exh. K-6)

[6] MIC is the acronym for the Motorcycle Industry Council which compiles registration data that is commonly relied upon by the motorcycle industry. It is similar to R.L. Polk registration data relied upon by the automobile industry. (Tr. 85)

[7] Included in the record as Exhibit K-12. This report was prepared in late 1996, in anticipation for the January 1997 hearing date. The data contained in the report uses projections for the last part of 1996 due to the unavailability of conclusive performance figures at the time of preparation.

[8] Longview is contained in Kawasaki District 3026 which includes the area of north Texas, north of Austin east to west, up to the Oklahoma state line, excluding the Panhandle.

concludes that Fun Motors failed to comply with the applicable provisions of the settlement agreement.

The following chart shows an interbrand comparison of Fun Motors' sales in the Longview SMSA versus the district average for motorcycles and ATVs during the years 1995 and 1996 (Exhs. K-13 and K-13A):

MOTORCYCLE

	1995 DISTRICT AVERAGE		1995 ALL SALES INTO THE LONGVIEW SMSA	
	Units	Mkt. Share	Units	Mkt. Share
Kawasaki	1,454	20.05%	21	11.54%
Honda	2,163	29.83%	70	38.46%
Yamaha	781	10.77%	18	9.89%
Suzuki	1,018	14.04%	8	4.40%
Harley	1,541	21.94%	65	35.71%
TOTAL 2-wheel	7,251		182	

	1996 DISTRICT AVERAGE		1996 ALL SALES INTO THE LONGVIEW SMSA	
	Units	Mkt. Share	Units	Mkt. Share
Kawasaki	1,594	19.17%	24	12.06%
Honda	2,383	28.66%	51	25.63%
Yamaha	1,131	13.60%	41	20.60%
Suzuki	1,165	14.01%	20	10.05%
Harley	1,790	21.53%	63	31.66%
TOTAL 2-wheel	8,314		199	

ATVs

	1995 DISTRICT AVERAGE		1995 ALL SALES INTO THE LONGVIEW SMSA	
	Units	Mkt. Share	Units	Mkt. Share
Kawasaki	1,034	13.51%	40	8.62%
Honda	1,726	22.55%	233	50.22%
Yamaha	1,088	14.21%	72	15.52%
Suzuki	646	8.44%	23	4.96%
Polaris	3,161	41.29%	96	20.69%
TOTAL ATV	7,655		464	

	1996 DISTRICT AVERAGE		1996 ALL SALES INTO THE LONGVIEW SMSA	
	Units	Mkt. Share	Units	Mkt. Share
Kawasaki	946	12.13%	21	4.15%
Honda	1,804	23.13%	237	46.84%
Yamaha	1,199	15.37%	112	22.13%
Suzuki	623	7.99%	37	7.31%
Polaris	3,185	40.83%	95	18.77%
TOTAL ATV	7,801		506	

Mr. Moseley also testified that the ATV market is 2½ times larger than the motorcycle market in the Longview SMSA. However, in 1996, Fun Motors' market share for ATVs in the Longview SMSA was only 4.15% compared to the district market share of 12.13%. This 47.5% drop from the previous year in the Kawasaki ATV market share occurred in Longview at the same time that the ATV market for Longview grew by 9%. Kawasaki also points out that its market share is lower in 1996 than the market share that Suzuki achieved for ATVs in the very same market in calendar year 1995, when a dealer was representing the line for only three months of the entire year. (Tr. 93-105 and Exhs. K-13, K-13A)

In regard to intrabrand performance, it is Kawasaki's position that the evidence establishes that a majority of Kawasaki customers residing in the Longview SMSA who are buying Kawasaki products are not buying them from the only Kawasaki dealer in Longview, Fun Motors. Kawasaki prepared pie charts,[9] based on Mr. Brown's testimony and conclusions drawn in his report, showing in 1995, two out of every three consumers in the Longview SMSA who bought a Kawasaki motorcycle bought it from a dealer other than Fun Motors. Furthermore, in 1996, 54.55% of Kawasaki owners who reside in the Longview SMSA bought Kawasaki motorcycles from a dealer other than Fun Motors.

As for ATV Kawasaki sales, the Respondent argues that in 1995, Fun Motors made 65% of the ATV Kawasaki sales in the Longview SMSA. Yet, in 1996, only 33% of the Kawasaki purchasers who reside in the Longview SMSA bought their ATVs from the Complainant. (Tr. 239-41; 252-253 and Exh. K-12 at p. 4 and p. 5) Kawasaki maintains that people in Longview are going to more remotely-located dealers outside the Longview SMSA to buy their Kawasaki products because Fun Motors has failed to adequately stock Kawasaki motorcycles, ATVs, and accessories. In support of this conclusion, Kawasaki relies on the testimony of Messrs. Moseley and Latch that Fun Motors has not ordered any 1997 Kawasaki product for its dealership from the manufacturer since it became available in August 1996. (Tr. 142-145 and 413-414)

It is Fun Motors' position that the 1994 Notice of Termination and resulting settlement agreement are irrelevant to this proceeding because that termination action was withdrawn by Kawasaki. Fun Motors believes the current termination proceeding is based only on the factors enumerated in the 1996 Notice of Termination. The ALJ believes that the fact that Kawasaki issued a 1994 Notice of Termination, which was ultimately withdrawn in an effort to settle the issues between the parties, is relevant in terms of the steps that the manufacturer has taken over time to assist the dealer in curing sales performance problems and other franchise agreement issues. These efforts clearly go to the weight of whether the manufacturer has established good cause to terminate the Dealer Sales Agreement.

Additionally, Fun Motors asserts that Kawasaki's sole basis for seeking this termination action is due to the decline in the dealer's market share which is evidenced by Mr. Murr's March 29, 1996, letter asking Fun Motors to voluntarily terminate its franchise agreement with Kawasaki. In his letter Mr. Murr discusses market share and informs Mr. Latch that Fun Motors' dealer performance was not equal to the district average in 1995, as agreed upon in the October 17, 1994, settlement agreement. Furthermore, Fun Motors maintains that Kawasaki's expert witness and his report exclusively related to dealer sales performance issues. The Complainant believes that by focusing on the settlement agreement market share performance standards, Kawasaki is getting around the provisions of the TMVC Code that prohibit a manufacturer from using market penetration as its exclusive reason for determining good cause to terminate a dealer.

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[9] Attached to this Proposal for Decision as "Appendix A."

Upon review of the entire record in this matter, the ALJ does not agree with Fun Motors that Kawasaki is only relying on market penetration as its basis for bringing the proposed termination action. It is the ALJ's opinion that Kawasaki has focused its expert testimony and report on Fun Motors' market penetration because it is one of the statutory elements to be considered by the Board in making its final determination on good cause. Regarding the substance of Mr. Murr's March 29, 1996, letter to Mr. Latch, the ALJ's analysis of the evidence differs with the Complainant's position. The ALJ believes that Mr. Murr's testimony is clear that he wrote this letter in an attempt to provide Fun Motors an opportunity to voluntarily terminate the franchise agreement after it failed to meet the district average standards in calendar year 1995, pursuant to the October 17, 1994, settlement agreement. (Tr. 363-365)

Under the circumstances, the ALJ believes that Mr. Murr was more than generous by first offering Mr. Latch an opportunity to voluntarily terminate the dealer sales agreement before initiating formal termination proceedings. The ALJ is concerned by Mr. Latch's response to Kawasaki's offer. In his letter to Mr. Murr, Mr. Latch declined Kawasaki's request and stated that "there is no way in hell I will voluntarily terminate the Kawasaki franchise." (Tr. 459-460) The ALJ also notes that Mr. Murr's letter does not strictly refer to dealer performance standards as argued by the Complainant. Mr. Murr states, "based on the foregoing and your failure to aggressively merchandise and market Kawasaki brand products, KMC [Kawasaki Motor Corp.] respectfully requests that you voluntarily terminate your dealer agreement." (Exh. K-6)

Fun Motors also argues that it was an impossibility to comply with the agreement to obtain a market share equal to or greater than the district average for calendar year 1995; because nowhere in the agreement is market share or market area defined to be the Longview SMSA or any other geographical area.[10] Fun Motors asserts further that no sales objectives were ever issued by Kawasaki pursuant to the dealership sales and service agreement and the only reference in the dealership agreement that might be construed as a market area is the area within a five mile radius of Fun Motors' place of business. (Tr. 110 and Exh. K-1) Mr. Latch testified that nowhere in the agreement does it say he will be judged on the Longview SMSA. He also testified that he did not understand the definition of market share or how the district average was going to be measured when he agreed to bring his sales performance up to the district average. (Tr. 419-440, 465) Without such a definition, Fun Motors believes that Kawasaki is making a unilateral analysis of the performance levels.

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[10] Paragraph N of the October 17, 1994, Settlement Agreement states the following: "Dealer agrees that for calendar year 1995, it will obtain a market share equal to or greater than the Kawasaki District Average for District No. 3026, the district in which Dealer conducts its business. Dealer acknowledges the District Average is a reasonable standard by which to measure performance and that such a standard is achievable in its market. Dealer acknowledges that failure to obtain and maintain such a market share will be reasonable grounds for the termination of Dealer's status as an authorized Kawasaki dealer, or the establishment of another Kawasaki dealership."

The ALJ questions the credibility of Mr. Latch's testimony that he has never understood sales performance criteria such as the definition of a market share and how a district average is calculated given the fact that Mr. Latch has been a dealer principal in this industry since 1988. Moreover, in 1989, Mr. Latch attended new dealer orientation and these standards were reviewed. (Tr. 441 and 465) Mr. Moseley testified that Kawasaki provides its dealers copies of their sales performance through MIC data on a monthly basis. Over the years, Mr. Latch has received approximately 100 monthly reports containing market share information. (Tr. 111) Prior to owning Fun Motors, Mr. Latch prepared corporate partnership franchise tax returns for two different accounting firms (Tr. 404) The ALJ has difficulty reconciling how a dealer with this level of education and nine years in the business does not understand the criteria upon which a manufacturer judges his sales performance.

Fun Motors contends that Kawasaki's sales analysis does not offer a fair representation of its performance because sales made by Fun Motors into areas other than the Longview SMSA are unaccounted for. Likewise, Kawasaki added two dealers in the nearby communities of Mount Pleasant and Timpson, which are each approximately 50 miles from Longview and both compete for sales with Fun Motors. (Tr. 216 and 217) Fun Motors argues that Kawasaki knew of its plans to add at least one of these dealers at the time it entered into the settlement agreement. Fun Motors does not believe that Kawasaki acted fairly by failing to disclose its plans to open a new dealership yet expecting Fun Motors to simultaneously bring up its market share.

The ALJ notes that the MIC registration data gives Fun Motors market share "credit" for sales made into the Longview SMSA regardless of whether Fun Motors or a dealer outside the market made the sale. Since Fun Motors is the only Kawasaki dealer in the Longview market, the sales into Longview by the other dealers help increase Fun Motors' market share. Furthermore, evidence contained in Mr. Brown's report demonstrates that in 1995, there were 21 Kawasaki motorcycles and 40 ATVs registered in the Longview SMSA. Warranty records filed by Fun Motors with Kawasaki on the sale of each new motor vehicle establish that Fun Motors sold 16 motorcycles and 41 ATVs in total sales in all markets. Therefore, in 1995, Fun Motors is getting market share "credit" for the additional 5 motorcycle sales but is losing "credit" for the extra ATV sale. In 1996, registration data showed that there were 24 motorcycles and 21 ATVs sold to customers living in the Longview SMSA. Yet, warranty records establish that Fun Motors sold in all markets 23 motorcycles and 11 ATVs. In other words, Fun Motors got the "credit" in their market share reports for all of these sales even though in both categories dealers from outside the market made a significant number of sales in the Longview SMSA.

It is Fun Motors' position that Mr. Brown's analysis produced numbers contrary to Kawasaki's position. At the hearing, Mr. Brown discovered numerous errors in his report and charts. Mr. Brown testified that he based his report on MIC data. (Tr. 259-260) Many of the problems with Mr. Brown's report resulted from his forecasting the 1996 totals since he prepared his report prior to the close of the 1996 calendar year. The ALJ did not consider the estimated figures in Mr. Brown's report because at the time of hearing the

actual MIC data was unavailable. The ALJ's analysis and recommendations are based upon the final 1996 MIC figures with no consideration given to the forecasted figures.

Finally, the Complainant asserts that the number of dealership visits and call reports by Mr. Moseley have declined over time showing a lack of support by Kawasaki. Fun Motors believes that this lack of effort explains Fun Motors' drop in sales performance. Mr. Moseley's call reports establish that he visited the dealership five times in 1989, three in 1990, four in 1991, three in 1992, none in 1993, one in 1994, two in 1995 and none in 1996. Fun Motors contends that this evidence demonstrates that Kawasaki abandoned the dealership in 1993 and that Kawasaki is hypocritical to argue that Fun Motors stopped supporting the brand, when at the same time Kawasaki stopped supporting the dealer.

In the analysis of the first statutory factor under TMVC Code § 5.02(b)(5), the ALJ finds that, separate and apart from any of the settlement agreement terms, Fun Motors' sales for both ATVs and motorcycles are extremely low. Due to this finding, it is not necessary for the ALJ to make a determination on whether the terms of the settlement agreement regarding sales performance are onerous or were entered into with unequal bargaining power as argued by the Complainant. Furthermore, absent an attempt by Fun Motors to present convincing evidence regarding potential reasons why the Longview market may not be able to support the district average standards or why Fun Motors' sales performance is so significantly lower than the district average, the ALJ finds that Fun Motors has failed to meet reasonable sales performance standards.

II. The Dealer's Investment and Obligations

Kawasaki argues that termination of the Kawasaki line will not harm Fun Motors for several reasons. First, Mr. Latch testified that if the Kawasaki line was terminated, the dealership operations would be maintained. (Tr. 524) Secondly, Kawasaki asserts that Fun Motors has only hired two additional employees since offering the Kawasaki, Polaris and Suzuki lines and has not made any substantial changes to its facilities. (Tr. 521-522) Moreover, the addition of the Kawasaki line was a minimal investment since there was no dealer to buy out. The land on which the dealership sits is not owned by Fun Motors. Kawasaki contends that there is no evidence of financial ruin or on-going obligations that Fun Motors will not be able to meet if it loses the Kawasaki line.

Kawasaki notes that in October 1995, while Fun Motors was still falling behind in its performance for Kawasaki, it added the Suzuki line to its dealer operations. (Tr. 63 and 412) Kawasaki believes this demonstrates a lack of effort on the part of Fun Motors to focus on bringing its Kawasaki performance up and complying with the terms of the settlement agreement. Additionally, Kawasaki argues that the acquisition of the Suzuki line was not a once in a lifetime opportunity for Fun Motors. Kawasaki points to Mr. Latch's testimony that he did not have to buy out an existing dealer to add the Suzuki line and he had the opportunity every year since 1988 to add the Suzuki line-make to his dealership operations. (Tr. 100 and 464)

The ALJ agrees with Kawasaki that the evidence demonstrates that Fun Motors has quit being a Kawasaki dealer for all practical purposes. In support of this conclusion, Kawasaki relies on Fun Motors' failure to order any 1997 Kawasaki product, yet, it ordered 1997 product for Polaris, Suzuki, and Honda. (Tr. 80) In 1995, Fun Motors purchased $425,000 in products from Kawasaki. In 1996, Fun Motors' purchases from Kawasaki dropped to $120,000. Kawasaki argues that Fun Motors' failure to market and purchase Kawasaki product hurts Kawasaki's name and investment in the Longview market. This lack of support of Kawasaki products will hurt the next Kawasaki dealer in this marketplace and consumers with future warranty and non-warranty repairs.

Furthermore, it is Kawasaki's position that it is ironic that the TMVC Code protects a dealer through the mechanism of a statutory stay that requires a distributor to continue doing business with a dealer during the pendency of a termination proceeding, but instead of using this provision as a shield, Fun Motors is using it as a sword against the distributor. Kawasaki argues that the Legislature never envisioned that a dealer who was fighting a termination action, would at the same time quit representing a line make.

Fun Motors argues that it has a substantial investment in its Kawasaki franchise. Fun Motors removed the walls of three offices to make showroom space for Kawasaki. (Tr. 498) Mr. Latch testified that he has worked hard building a demand for Kawasaki products in his area. Before Fun Motors opened its dealership, Kawasaki had several unsuccessful dealerships which closed in the Longview area. Mr. Latch testified further that he allocated advertising space, floor space, and resources to Kawasaki. The Complainant points to Mr. Moseley's testimony that in preparation for the start-up of a dealership, the dealer must invest in product, parts inventory, brochures, posters, other advertising materials, microfiche for parts numbers and schematics. (Tr. 163-164) Mr. Latch stated that he has attended seven of the eight Kawasaki conventions since he became a dealer. (Tr. 498) Moreover, Fun Motors contends that if the franchise agreement is terminated, it will not be reimbursed for the $90,000 worth of full value of its dealership in the buy/sell agreement between Fun Motors and Gratty, Inc. (Tr. 517) Finally, Fun Motors asserts that it did not order 1997 Kawasaki product because it did not want to pay the original shipping costs or floorplan interest on product that it may eventually lose as a result of this termination action. (Tr. 458)

The ALJ concurs with the Respondent that the evidence shows that Fun Motors lost interest in being a Kawasaki dealer several years ago. The addition of the Suzuki line in October 1995, at the exact time that it was imperative for Fun Motors to bring up its sales performance to the district level, along with its failure to purchase 1997 Kawasaki product, demonstrates that Fun Motors has substantially diminished its support and investment in the Kawasaki product. If Mr. Latch was seriously committed to being a Kawasaki dealer, then he would have purchased and displayed the latest Kawasaki products on his showroom floor. It is not reasonable that concern over paying the original shipping costs and floorplan interest was a serious deterrent against purchasing 1997 model year product. Those items are simply a cost of doing business. Besides, the TMVC Code is heavily weighted towards protecting dealers in regard to repurchase issues. The ALJ is troubled

by Mr. Latch's testimony that he believed the only acts that will get a dealer terminated are death, a felony and bankruptcy. (Tr. 453) The ALJ finds that Fun Motors' investment in its Kawasaki line has been minimal and its dealership will not close with the loss of the Kawasaki franchise. Furthermore, it does not have on-going obligations that will suffer as a result of terminating the franchise.

Finally, the ALJ questions whether the buy/sell agreement between Mr. Latch and Mr. Gratton has ever been seriously contemplated by the parties. The Complainant requested a continuance in both October and November 1996, which resulted in a two month delay of the original hearing date in order for Mr. Latch and Mr. Gratton to finalize the buy/sell agreement. This buy/sell has been pending for approximately 1½ years. At the conclusion of the hearing, the ALJ noted on the record that if the buy/sell agreement was finalized before a proposal for decision was issued that the parties could file a motion to reopen the record to submit evidence of the finalized agreement. Upon review of the entire record, the ALJ concurs with the Respondent by doubting how serious the parties were about their negotiations when it took Mr. Latch and Mr. Gratton approximately one year to even draft an agreement. Furthermore, the $90,000 amount assessed to the current value of the dealership assets is unreliable since the transaction has never closed.

III. Injury To The Public Welfare

Kawasaki believes that if Fun Motors remains a Kawasaki dealer the public is injured because a majority of consumers in the Longview SMSA are choosing to go outside of the market area to purchase their Kawasaki products rather than buy from Fun Motors. Kawasaki maintains that Fun Motors' choice not to be competitive with the Kawasaki line hurts the public, dealers and distributors because healthy competition is in the public interest. Mr. Murr and Mr. Moseley both testified that upon termination, there would be a new dealer appointed for the Longview market. (Tr. 191, 380) Kawasaki asserts that a new dealer will be able to provide the public healthy competition and a convenient location for warranty service work.

Since several different entities have failed at becoming Kawasaki dealers in the Longview market prior to Fun Motors, the Complainant argues that the market will not support a single-line Kawasaki dealer. (Tr. 487) The past failure of any of those dealerships to succeed hurt the Kawasaki name, as well as interfered with the public's ability to purchase Kawasaki products. If Fun Motors' Kawasaki franchise is terminated, Longview would no longer have a Kawasaki dealership and the public would be harmed. However, the ALJ believes that the public is already harmed by Fun Motors' lack of support for the Kawasaki product and a new dealer would be in the public interest.

IV. The Adequacy of the Dealer's Service Facilities, Equipment, Parts, and Personnel in Relation to Those of Other Dealer's of New Motor Vehicles of the Same Line-Make

Kawasaki notes that there is no evidence that Fun Motors' service facilities, parts, or personnel are deficient. However, the Respondent asserts that the dealership's failure to stock 1997 Kawasaki product in its inventory, as required by the Dealer Sales Agreement, is inadequate in relation to other Kawasaki dealers. Fun Motors points to Mr. Moseley's testimony that its service and facilities are adequate and neither one gave rise to the proposed termination. (Tr. 136 and 497)

V. The Parties' Compliance with Their Franchise Agreement

Kawasaki argues that Fun Motors is out of compliance with its Dealer Sales Agreement in several ways. First, the Respondent believes that Fun Motors has failed to provide Kawasaki with representation at least equal to that provided other competitive brands or products sold by Fun Motors which is in violation of Paragraph 11[11] of the Dealer Sales Agreement. Kawasaki maintains that this is demonstrated by Fun Motors' decision not to purchase 1997 Kawasaki products which became available in the fall of 1996. However, Fun Motors has purchased and currently has on display 1997 product for Honda, Polaris, and Suzuki. (Tr. 79-81) Also, Fun Motors' 4.16% ATVs market share in the Longview SMSA for 1996 was lower than Fun Motors' market share for Suzuki during the last three months of 1995 and it had carried the Suzuki line for only three months. Finally, Kawasaki believes that Fun Motors' failure to have a Yellow Page Ad for Kawasaki in 1995 when it carried a Yellow Page Ad for other manufacturers shows Fun Motors' failure to equally represent the Kawasaki line and it is additionally a breach of Paragraph 19A[12] of the Dealer Sales Agreement.

Kawasaki contends that Fun Motors has not participated in training courses, service schools, sales and management seminars and personnel development programs that are provided or required by Kawasaki. Specifically, Kawasaki argues that Fun Motors did not send any of its employees to a Kawasaki sponsored sales seminar taught by Gart Sutton, a sales consultant specialist. (Tr. 367) However, Fun Motors representatives did attend two sales seminars sponsored by Honda. (Tr. 567-568) Likewise, Kawasaki asserts that

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[11] Paragraph 11 states: "EQUAL REPRESENTATION. In the event DEALER sells other brands or lines of products which are competitive with those Products purchased by DEALER from DISTRIBUTOR, DEALER agrees to provide the Products with at least an equal representation to that provided other competitive brands or lines."

[12] Paragraph 19A states: "ADVERTISING AND TRADE PRACTICES. DEALER agrees to develop, utilize and participate in various advertising and sales promotion programs in fulfilling its responsibilities for selling, promoting and advertising the Products. In so doing, DEALER agrees to (a) maintain a DISTRIBUTOR sponsored trademark or trade name advertising listing or a display advertising listing in the Yellow Pages of the principal telephone directory in its marketing area and in a form approved by DISTRIBUTOR; (b) make reasonable use of newspaper, direct mail, television, radio or other appropriate advertising media as suggested by DISTRIBUTOR ..."

Fun Motors has not sent any of its service employees to service schools since 1989, which is in violation of Paragraph 17[13] of the Dealer Sales Agreement. (Tr. 367)

Kawasaki also believes that Fun Motors is in violation of Paragraph 15[14] of the Dealer Sales Agreement since it has not ordered or stocked any 1997 Kawasaki products. Furthermore, Fun Motors has not stocked any Kawasaki ATVs with an engine size greater than 250 ccs. Mr. Moseley testified that in the Longview market in 1996, 90.48% of all ATVs sold had engines of 250 ccs or larger.

Moreover, Kawasaki argues that Fun Motors has breached Paragraph 5[15] of the Dealer Sales Agreement because it has not used its best efforts and due diligence to energetically and aggressively develop and promote the sale of Kawasaki products. Kawasaki believes this is evidenced by Fun Motors not ordering or stocking 1997 product, its failure to stock ATVs with an engine larger than 250ccs, and its omission of a Yellow page Ad for Kawasaki in 1995. Similarly, Fun Motors also has not used its available co-op advertising funds. Kawasaki points out that it will provides funds to reimburse a dealer from 50 to 60% of its advertising costs for advertisements that promote the Kawasaki product. (Tr. 27-28). Kawasaki asserts that Fun Motors did not use any of the $2,000 worth of co-op advertising money available to the dealer for promoting the Kawasaki line in 1995. (Tr. 64-65) In 1996, Fun Motors used only 7% of the co-op advertising funds available to it. (Tr. 378)

Finally, Kawasaki maintains that Fun Motors has breached Paragraph 5 of the Dealer Sales Agreement by its poor sales performance. Paragraph 5 provides that Fun Motors and Kawasaki agree that Kawasaki can evaluate Fun Motors' development and promotion of Kawasaki products both as a whole and separately for each model and type

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[13] Paragraph 17 states: "EMPLOYEE TRAINING. DEALER will participate in and will make available to its employees training courses, service schools, sales and management seminars and personnel development programs as may be provided or required from time to time by distributor..."

[14] Paragraph 15 states: "MODEL INVENTORY. Subject to the ability of DISTRIBUTOR to supply, DEALER agrees to purchase from DISTRIBUTOR and at all times maintain an inventory of then available models of Products, which inventory shall at no time be less than the number of Products reasonably established by Distributor after consultation with DEALER."

[15] Paragraph 5 states: "DEALER agrees at its own cost and expense, to use its best efforts and due diligence to energetically and aggressively develop and promote the sale of PRODUCTS, including each model and type thereof. DEALER and DISTRIBUTOR agree that DISTRIBUTOR shall evaluate DEALER'S development and promotion of the sale of Products, both as a whole and separately for each model and type based on such reasonable criteria as DISTRIBUTOR may determine from time to time, which may include but not be limited to: (a) fair and reasonable sales objectives which may be established from time to time by DISTRIBUTOR for DEALER after review with DEALER; (b) the ratio of sales of Products by DEALER to sales of other makes of similar products as compared with (i) such ratio on a local, state, and/or nationwide basis, (ii) the average ratio for all Kawasaki dealers appointed by DISTRIBUTOR, and (iii) such ratios for at least two other comparable Kawasaki dealers; (c) the development of DEALER'S sales performance over a reasonable period of time; and (d) particular conditions in DEALER'S area of primary responsibility, if any, affecting such performance or potential sales performance."

based on such reasonable criteria as Kawasaki may determine from time to time. Kawasaki believes the settlement agreement was a mechanism for the parties to agree that Fun Motors would obtain a market share equal to or greater than the Kawasaki district average for District 3026. In the settlement agreement, Fun Motors agreed that "the District Average is a reasonable standard by which to measure performance and that such a standard is achievable in its market." Additionally, the agreement states "failure to obtain and maintain such a market share will be reasonable grounds for the termination of the dealer's status as an authorized Kawasaki dealer, or the establishment of another Kawasaki dealership. (Exh. K-3, Paragraph N)

Fun Motors argues that it does equally represent Kawasaki products on its dealership floor. The dealership sponsors community water craft rides in which Kawasaki products are used. (Tr. 492) Furthermore, Mr. Latch testified that he races Kawasaki motorcycles. He is an ATV instructor and uses Kawasaki ATVs for student training. Mr. Latch testified that the omission of an advertisement for Kawasaki in the 1995 Yellow Pages was simply an oversight and was unintentional. (Tr. 499)

In regard to advertising, Mr. Latch testified that he advertised on television on three separate occasions as a joint effort with a Tyler dealership. (Tr. 447) The Complainant maintains that it advertises Kawasaki through the Thrifty Nickel which has a wide distribution throughout the Fun Motors sales area. This advertising is for all of the brands that Fun Motors carries and each logo is of equal size. (Tr. 491-492) Fun Motors argues that their multi-line advertising approach benefits Kawasaki because a customer may come into the dealership looking for a Honda but leave with a Kawasaki since Fun Motors has a wide selection of line makes. (Tr. 487-492)

Fun Motors argues that it did not order 1997 Kawasaki products because if a customer requests a 1997 vehicle, it can order one by telephone. (Tr. 143) Fun Motors maintains that if it stocked 1997 product and the termination is granted, it would be saddled with the cost of carrying the inventory, the cost of original shipping, floorplan interest, insurance, redelivery inspection, and setup costs which would never be reimbursed by Kawasaki in the event of termination. (Tr. 507) Finally, Fun Motors believes that by not ordering 1997 product its 1996 sales were hurt; therefore, Kawasaki's threat of termination is responsible for the dealer's decreased sales. (Tr. 393)

Although the terms of the Dealer Sales Agreement are not controlling over the TMVC Code, the ALJ finds that the parties compliance with the franchise agreement is pertinent to good cause as outlined by TMVC Code § 5.02(b)(5). The ALJ agrees with the Respondent that the evidence demonstrates that Fun Motors is not providing equal representation to Kawasaki as it is to other competitive brands, nor is it complying with the provision requiring it to stock current models. By failing to maintain 1997 Kawasaki product, Complainant has materially breached its obligations under its franchise agreement with Kawasaki. Fun Motors' has used so little of its co-op advertising money that the ALJ finds that Fun Motors is not energetically and aggressively promoting the sale of Kawasaki products. The Thrifty Nickel is an unconventional method of advertising. What is more,

multi-line dealership advertising demonstrates a lack of effort to promote Kawasaki which is resulting in poor sales performance. These circumstances certainly constitute good cause for the termination as set forth in TMVC Code § 5.02(b)(5).

VI. Enforceability of the Franchise Agreement From a Public Policy Standpoint, Including without Limitation, Issues of the Reasonableness of the Franchise Agreement's Terms, Oppression, Adhesion, and the Relative Bargaining Power of the Parties

Kawasaki asserts that in terms of public policy it has "bent over backwards" to give Fun Motors an opportunity to perform. Kawasaki offered the settlement agreement to Fun Motors which was voluntarily accepted by Fun Motors. Kawasaki argues that it offered this agreement even though Fun Motors was out of trust, which Kawasaki considered to be a very serious offense regarding the integrity of the dealership. Messrs. Moseley and Murr testified that Fun Motors had the opportunity to take the agreement and have it reviewed by an attorney. Instead, Fun Motors executed the agreement agreeing that terms were reasonable, fair and achievable. (Exh K-3, Paragraph V)

Kawasaki contends that once Fun Motors failed to meet the terms of the settlement agreement that Kawasaki had no alternative but to proceed with sending out the June 6,1996, Notice of Termination. Kawasaki believes that Fun Motors has been allowed by the TMVC Code to continue to be a Kawasaki dealer, even though during this time period, Fun Motors has refused to order and promote 1997 products. Kawasaki concludes that there is no public policy reason not to enforce the terms of the Dealer Sales Agreement, or the terms of the settlement agreement, nor to prevent this termination from going forward.

Fun Motors believes that Kawasaki is attempting to implement additional burdens to the Dealer Sales Agreement through the settlement agreement that are not authorized under the TMVC Code. The Complainant maintains that the settlement agreement was oppressive and the dealer was not in a fair bargaining position when it entered into the agreement. The document was prepared by Kawasaki attorneys and Mr. Latch was not given an opportunity to review the document prior to the meeting. (Tr. 386 and 173) Fun Motors argues that the terms were not negotiated and that Mr. Latch was told that he had to agree to the terms of the agreement or be terminated.

The legislature has mandated that the Board consider all circumstances including the enumerated factors under TMVC Code § 5.02(b)(5) in determining good cause for termination. The ALJ has serious reservations about the ability of any party to waive or contract away the legislative mandate to the Board. Furthermore, TMVC Code § 1.04 provides that an agreement to waive the terms of the Act is void and unenforceable. However, even without considering whether the settlement agreement is unenforceable from a public policy standpoint due to its potential oppressive or onerous nature as argued by the Complainant, the ALJ finds that when examining the totality of the circumstances and the statutory criteria as mentioned above that good cause exists for the termination

FINDINGS OF FACT

1. Kawasaki Motors Corporation, U.S.A. is a licensed new motor vehicle distributor in the state of Texas.

2. Fun Motors of Longview, Inc., is a licensed new motor vehicle dealer in the state of Texas.

3. Kawasaki and Fun Motors entered into a dealer sales and service agreement and have been in a franchisor/franchisee relationship since approximately July 1988.

4. Kawasaki gave notice of termination of the dealer agreement by letter to the Complainant on September 7, 1994.

5. The September 7, 1994 notice of termination sets forth the following basis for the action:

   (a) failure of the dealership to maintain its account with Kawasaki on a current basis in accordance with Kawasaki's terms and conditions of sale;
   (b) failure of the dealership to pay its debts in the ordinary course of business;
   (c) inability of the dealership to pay its debts as they became due;
   (d) failure to provide prompt payment on the sale of Kawasaki products which were subject to flooring or other financing agreements as required by the terms and conditions of the Flooring and Financing Agreement;
   (e) failure to acquire and maintain a line of credit in the requisite amount to be used exclusively for Kawasaki motorcycles with a financial institution satisfactory to Kawasaki;
   (f) failure to provide Kawasaki with current accurate financial information as requested;
   (g) failure to maintain adequate inventory of Kawasaki products to meet consumer demand;
   (h) failure to aggressively merchandise and market Kawasaki products;
   (i) failure to provide Kawasaki products with representation at least equal to that which the dealer provided other brands or lines of products sold by the dealer which are competitive with Kawasaki products;
   (j) failure to comply with the terms and conditions of the Sales and Service Agreement; and
   (k) failure to conduct business in a manner which reflects favorably on the good name and reputation of Kawasaki and the Kawasaki product.

6. Representatives from Fun Motors and Kawasaki met on October 17, 1994, and entered into a Settlement Agreement in an effort to resolve the September 7, 1994, notice of termination issues.

7. The terms of the Settlement Agreement required Fun Motors to reach the district average performance standards for District 3026 during the 1995 calendar year, provide equal representation for Kawasaki with other brands, and maintain a minimum 90-day inventory of Kawasaki products and accessories in consideration for Kawasaki to drop its September 7, 1994, notice of termination action.

8. Kawasaki District Manager, Tony Moseley, advised Randall Latch on four different occasions during 1995 that Mr. Latch's dealership's Longview Metropolitan Statistical Area (SMSA) sales performance was falling substantially behind the district average.

9. In July 1990, Fun Motor added Polaris ATVs to its dealership operations and in October 1995, Fun Motors added the Suzuki line.

10. On March 29, 1996, Kawasaki Regional Manager, Tony Murr, sent a letter to Fun Motors notifying the dealership that it failed to reach the district average for its Longview SMSA sales performance standards in 1995 and failed to aggressively merchandise and market Kawasaki brand products.

11. Mr. Murr requested that Fun Motors voluntarily terminate its dealer sales and service agreement.

12. On April 9, 1996, Mr. Latch by letter advised Kawasaki that he would not voluntarily terminate his Dealer Sales and Service Agreement.

13. Kawasaki gave a second Notice of Termination of the Dealer Sales and Service Agreement by letter to the Complainant on June 6, 1996. Kawasaki sent a copy of the termination notice of the Motor Vehicle Division as required by the Texas Motor Vehicle Commission Code § 5.02(b)(3)(A)(I) on June 12, 1996.

14. The Complainant filed a protest with the Motor Vehicle Division on July 23, 1996.

15. The June 6, 1996, Notice of Termination sets forth the following reasons for the action:

    (a) your failure to provide Kawasaki products with representation at least equal to that which you provide other brands or lines of products sold by you which are competitive with Kawasaki products;
    (b) your failure to aggressively merchandise and market Kawasaki products;
    (c) your failure to maintain reasonable market share;

(d) your failure to meet the terms set forth in the Settlement Agreement between Kawasaki and Fun Motors executed October 17, 1994;
(e) your failure to comply with the terms and conditions of the Dealer Sales and Service Agreement; and
(f) your failure to conduct business in a manner that reflects favorably on the good name and reputation of Kawasaki and Kawasaki products.

16. Fun Motors interbrand sales performance in the Longview SMSA was substantially below its 1994 performance levels and the 1995 and 1996 District 3026 averages.

17. Fun Motors' 1995 sales in the Longview SMSA for Kawasaki motorcycles was 11.54% and the district average was 20.0%. In 1996, Fun Motors' sales in the Longview SMSA for Kawasaki motorcycles was 12.06% and the district average was 19.17%.

18. Fun Motors' 1995 sales in the Longview SMSA for Kawasaki ATVs was 8.62% and the district average was 13.51%. In 1996, Fun Motors' sales in the Longview SMSA for Kawasaki ATVs was 4.15% and the district average was 12.13%.

19. Fun Motors is the only Kawasaki dealer in Longview.

20. A majority of Kawasaki customers residing in the Longview SMSA are buying Kawasaki products from dealers other than Fun Motors.

21. Fun Motors has not ordered any 1997 product for its dealership from Kawasaki since it became available in August 1996.

22. Fun Motors has ordered and stocked 1997 product for Polaris, Suzuki, and Honda.

23. Fun Motors will not close its dealership operations if the franchise agreement between Kawasaki is terminated and there are no ongoing obligations that Fun Motors would not be able to meet if the Kawasaki line is terminated.

24. Fun Motors has added two employees since adding the Kawasaki, Polaris and Suzuki lines to its Honda dealership.

25. Overall, Fun Motors initial investment to add the Kawasaki line was minimal because it did not have to purchase the franchise from another dealer.

26. Fun Motors did remodel three offices to make showroom space available for Kawasaki.

27. Fun Motors invested in product, parts inventory, brochures, posters, microfiche for parts numbers and schematics in order to start up business as a Kawasaki dealer.

28. Fun Motors' substantially diminished support and investment of the Kawasaki line is demonstrated by its failure to purchase 1997 Kawasaki product and its poor sales performance.

29. Fun Motors failure to be competitive with Kawasaki products hurts the public, dealers, and the distributor/manufacturer due to (a) lack of competition, (b) the inability for the consuming public to have the opportunity to conveniently inspect and purchase Kawasaki products, and (c) the inability of Kawasaki to have an active dealership which services in public in providing sales and service representation to Kawasaki.

30. The failure of Fun Motors to provide Kawasaki with equal representation is demonstrated by (a) failing to order or stock 1997 product while at the same time ordering product for other competitive line-makes and (b) failing to advertise in the 1995 Yellow Pages and is in violation of Paragraphs 11, and 19A of the Dealer Sales and Service Agreement.

31. The failure of Fun Motors to participate in training courses, service schools, sales and management seminars, and personnel development programs provided or required by Kawasaki violates Paragraph 17 of the Dealer Sales and Service Agreement.

32. The failure of Fun Motors to order 1997 Kawasaki products and to utilize advertising co-op funds violates demonstrates failure by the dealer to use its best efforts and due diligence to energetically and aggressively develop and promote the sale of Kawasaki which violates Paragraphs 5 and 15 of the Dealer Sales and Service Agreement.

33. Kawasaki has established by a preponderance of the evidence that Fun Motors has failed to comply with material provisions of the Dealer Sales and Service Agreement.

34. Kawasaki has established by a preponderance of the evidence that good cause exists for termination of its Dealer Sales and Service Agreement with Fun Motors.

35. Kawasaki intends to attempt to establish another Kawasaki franchise to replace Complainant if the termination of the Complainant's franchise agreement is upheld by the Board.

CONCLUSIONS OF LAW

1. Kawasaki has complied with the notice requirements of Texas Motor Vehicle Commission Code Section 5.02(b)(3)(A)(i) with respect to the termination of Fun Motors' Kawasaki Authorized Dealer Sales and Service Agreement.

2. Kawasaki has established by a preponderance of the evidence that good cause exists for termination of Fun Motors' Kawasaki Authorized Dealer Sales and Service Agreement, as required under Texas Motor Vehicle Commission Code Section 5.02(b)(3).

Recommended Action

The Administrative Law Judge recommends that the Texas Motor Vehicle Board enter an order in this proceeding providing as follows:

1. That the protest of the Complainant in this proceeding be dismissed; and

2. That no further action be taken by the Board to prevent the termination by Respondent, Kawasaki Motor Corporation U.S.A, of its franchise agreement with Complainant, Fun Motors of Longview, Inc.

Date: June 20, 1997

Respectfully submitted,

Cecile Hanna

Cecile Hanna
Administrative Law Judge

TAB E

TEXAS MOTOR VEHICLE COMMISSION

MESA MACK SALES OF MIDLAND AND EXECUTORS OF THE ESTATE OF TRUMAN O'NEIL, Complainants,	X	
vs.	X	PROCEEDING NO. 72
MACK TRUCKS, INC. Respondent.	X	

FINAL ORDER

BY THE COMMISSION:

The Texas Motor Vehicle Commission, having duly considered the entire record in this proceeding, and having considered the Hearing Report of the Hearing Examiner and the exceptions thereto filed by the parties, does hereby enter its Final Order in this proceeding as follows:

IT IS ORDERED:

1. That the Hearing Report filed in this proceeding, including the Hearing Examiner's opinion, findings of fact, conclusions and recommended action, be and they hereby are adopted by the Commission;

2. That the complaint in the instant proceeding be and it hereby is dismissed in all respects; and

3. That no action be taken by the Commission to prevent the termination of the Distributor Agreement by Respondent.

Dated: February 18, 1977.

W. O. BANKSTON, Chairman
Texas Motor Vehicle Commission

ATTESTED:

RUSSELL HARDING
Executive Director

TAB F

TEXAS MOTOR VEHICLE COMMISSION

CLARENCE TALLEY, INC., Complainant,	X X	
v.	X	PROCEEDING NO. 96
VOLKSWAGEN OF AMERICA, INC., Respondent.	X X	

FINAL ORDER

BY THE COMMISSION:

The Texas Motor Vehicle Commission, having duly considered the Hearing Report of the Hearing Examiner, including the findings of fact, conclusions and recommended action contained therein; and no exceptions thereto having been filed by the parties; and the Commission having heard additional testimony on behalf of the Complainant, does hereby enter its Final Order in this proceeding as follows:

IT IS ORDERED:

1. That the Hearing Report filed in this proceeding, including the Hearing Examiner's opinion, findings of fact, conclusions and recommended action, be and they hereby are adopted by the Commission;

2. That the complaint in the instant proceeding be and it hereby is dismissed in all respects; and

3. That no action be taken by the Commission to prevent the termination by the Respondent of its Volkswagen franchise agreement with Complainant.

Commissioner Bankston abstained from voting in this proceeding.

Date: September 15, 1977

John N. Cleveland, Vice Chairman
Texas Motor Vehicle Commission

ATTESTED:

Russell Harding
Executive Director